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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 365

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED; GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS,

vs.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 31, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,496)

(34,496)

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IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Equity. No. 39636

JAK. ROBERT SIGG-FEHR, GOTTFRIED RUDOLPH BAUMANN-KIENAST, and EDMUND GAMS, Complainants,

against

FRANK WHITE, Individually and as Treasurer of the United States of America; James C. Davis, Individually and as Director General of Railroads; Thomas W. Miller, as Alien Property Custodian, and Arthur von Briesen, Fritz von Briesen, Hans von Briesen, and Otto von Schrenk, Copartners in the Practice of Law under the Name of Briesen & Schrenk, Defendants

BILL OF COMPLAINT FOR INJUNCTION—Filed December 8, 1921

To the Honorable Judges of the Supreme Court of the District of Columbia, sitting in equity:

Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann Kienast, and Edmund Gams, individually and as a copartnership organized under the laws of the Confederation of Switzerland, bring this bill against Thomas W. Miller, as Alien Property Custodian, and against Frank White, a citizen of the State of North Dakota, in the United States of America, having a permanent domicile in said State of North Dakota, but at the present time residing in the city of Washington, District of Columbia, and now the duly ap-[fol. 2] pointed, qualified, and acting Treasurer of the United States, and against James C. Davis, a citizen of the State of Iowa, in the United States of America, having a permanent domicile in said State of Iowa, but at the present time residing in the city of Washington, District of Columbia, and now the duly appointed, qualified, and acting Director General of Railroads under and by virtue of the act of Congress of the Unted States, approved the 29th day

of August, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," and the acts amending and supplementing the said act and the proclamations and Executive orders issued thereunder, and against Arthur von Briesen, Fritz von Briesen, Hans von Briesen, and Otto von Schrenk, citizens and residents of the State of New York, in the United States of America.

As a basis for the relief hereinafter prayed for, complainants above named show and allege the following:

I. All the complainants are citizens of the Confederation of Switzerland and residents of the city of Zurich therein; and all of said complainants are now, and since the 8th day of November, 1916, have been, copartners in the business and for the purpose, among others, of acquiring, owning, and holding the property hereinafter mentioned and the profits and income therefrom.

II. On information and belief, that the defendant, Thomas W. Miller, is a citizen of the State of Delaware, having a permanent domicile in said State, but at the present time residing in the city of Washington, District of Columbia, and is now the duly appointed and qualified and acting Alien Property Custodian of the United States, having duly qualified as such official on or about the 16th day of March, 1921, and that A. Mitchell Palmer was at all the times hereinafter mentioned, up to the 4th day of March, 1919, the duly qualified and acting Alien Property Custodian, under and pursuant to the provisions of the act of Congress known as the "trading with the enemy act" and the amendments thereto and proclamations and Executive orders issued thereunder, and that on or about the 4th day of March, 1919, Francis P. Garvan, a citizen and resident of the State of New York, was duly appointed Alien Property Custodian to succeed the said A. Mitchell Palmer, who on or about the said date resigned said office, and said Francis P. Garvan duly qualified as such Alien Property Custodian under and pursuant to the said act of Congress and succeeded on said date to all of the rights and duties and to the possession, custody, and control of all of the property then held by the aforesaid A. Mitchell Palmer as such Alien Property Custodian; and said Francis P. Garvan continued

to act as such official until on or about the 16th day of March, 1921, when he resigned as such official and defendant Thomas W. Miller was duly appointed and duly qualified as such Alien Property Custodian under and pursuant to said act of Congress and succeeded on that date to all of the rights and duties and to the possession, custody, and control of all the property then held by the aforesaid Francis P. Garvan as such Alien Property Custodian, and has continued to act as such official up to the present time.

III. On information and belief, that the defendant Frank White is a citizen of the State of North Dakota, having a permanent domicile in said State, but at the present time [fol. 3] residing in the city of Washington, District of Colubia, and is now the duly appointed and qualified and acting Treasurer of the United States, having duly qualified as such official on or about the 2nd day of May, 1921; that said Frank White as such official succeeded Guy F. Allen, a resident and citizen of the State of Maryland, who was the duly qualified acting Treasurer of the United States and who duly qualified as such on or about the 5th day of January, 1921, succeeding John Burke, the duly appointed, qualified, and acting Treasurer of the United States; that the said John Burke was duly appointed, qualified, and acting Treasurer of the United States during all of the times hereinafter mentioned up to on or about the 5th day of January, 1921, when he was succeeded as such official by the said Guy F. Allen, who succeeded also on said date to all of the rights and duties of the said office and to the possession and control of all of the moneys then held by or in the custody or control of the Treasurer of the United States; that the said Guy F. Allen continued to act as such Treasurer of the United States and to have, possess, and be subject to the duties of said office and to have the possession and control of all of the moneys then held by or in the custody or control of the Treasurer of the United States until on or about the 2nd day of May, 1921, when he was succeeded by the said Frank White; that the said Frank White continued to act as such Treasurer of the United States and to have, possess, and be subject to the duties of said office and to have the possession and control of all of the moneys then held by or in the custody or control of the Treasurer of the United States up to the present time.

IV. On information and belief, that the defendant James C. Davis is a citizen of the State of Iowa, having a permanent domicile in said State, but at the present time residing in the city of Washington, District of Columbia, and is at the present time the duly appointed, qualified, and acting Director General of Railroads of the United States of America under and by virtue of the act of Congress approved the 29th day of August, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," and the acts supplementing and amending the same and the proclamations and Executive orders issued thereunder; that the said James C. Davis duly qualified as such Director General of Railroads on or about the 20th day of March, 1921, succeeding John Barton Payne as such official; that the said John Barton Payne was duly appointed Director General of Railroads of the United States and duly qualified as such official on or about the 18th day of May, 1920, succeeding Walker D. Hines; that said Walker D. Hines was duly appointed Director General of Railroads and duly qualified as such on or about the 10th day of January, 1919, succeeding as such official William G. McAdoo; that the said Walker D. Hines succeeded to all of the rights, powers, and duties of the said William G. McAdoo and continued to act as such Director General of Railroads until he was succeeded by the said John Barton Payne; and the said John Barton Payne succeeded to all of the rights, powers, and duties of the said Walker D. Hines and continued to act as such Director General of Railroads until he was succeeded by the said James C. Davis; and the said James C. Davis succeeded to all of the rights, powers, and [fol. 4] duties of the said John Barton Payne and has continued to act as such Director General of Railroads up to the present time.

V. That the defendants Arthur, Fritz, and Hans von Briesen and Otto von Schrenk are citizens and residents of the State of New York, and that at all of the times hereinafter mentioned they were and still are members of the bar of the State of New York, and copartners engaged in the practice of law in the city of New York.

VI. The Confederation of Switzerland, of which the complainants are residents, is not, and never has been, at war with the United States of America, and the complainants, both at the present time and during all of the times hereinafter mentioned, are not and were not enemies of the United States of America, either within the meaning of the trading with the enemy act or otherwise.

VII. Locomotive Superheater Company (hereinafter called the Superheater Company) is a corporation of the State of Delaware, having an authorized capital of $2,500,000, consisting of 25,000 shares of stock, all of one class, of the par value of $100 per share of which 24,875 were issued and outstanding. During all of the times mentioned in this complaint said company had, and still has, its principal office and place of business in the city of New York and was and is chiefly engaged in the business of manufacturing and selling and of licensing others to manufacture and use, parts and appliances for railroad locomotives, and particularly locomotive superheaters. Said company has property and assets of great value and conducts a highly profitable business, and the shares of its stock are accordingly very valuable.

VIII. On the 8th day of November, 1916, complainants acquired by purchase from Schmidt'sche Heissdampf-Gessellschaft, a German corporation doing business in Cassel, Germany (hereinafter called the German Corporation), 12,825 shares of the capital stock of the Superheater Company, with dividends from January 1st, 1917, at a price per share equal to double the par value, payable in Swiss funds in Zurich, Switzerland. By the said purchase the complainants became the then present owners of such stock and became entitled to possession thereof and to the transfer thereof on the books of the Superheater Company, and entitled to receive the dividends thereon, subject to the temporary retention of custody of said stock and dividends by Messrs. Briesen & Schrenk, as trustees for complainants, until the payment of the purchase price, as will more fully appear presently herein.

IX. Upon information — belief, said 12,825 shares of stock thus purchased were part of a block of 13,490 shares

of the capital stock of the said Superheater Company, which for some time prior to October 2nd, 1914, had been represented by one certificate, No. 134, issued to said German Corporation and in its name. This certificate at the time of the declaration of war between Great Britain and Germany had been left for safe-keeping in the city of London. Said certificate, as above stated, was issued in the name of said Schmidt'sche Heissdampf-Gesellschaft and was unendorsed. On or about October 2nd, 1914, at the instance and request of said German Corporation, said certificate No. 134 was canceled upon the books and records of said Superheater Company without surrender of the original certificate and in lieu thereof there were issued a certificate or [fol. 5] certificates in the name of Briesen & Knauth for 2,500 of said 13,490 shares. Said Briesen & Knauth had no beneficial interest in said shares but held the same as trustees or agents for said German Corporation. On or about January 1, 1916, the firm of Briesen & Knauth was dissolved by the death of said Knauth and was succeeded by the partnership of Briesen & Schrenk, named as defendants herein, and said 2,500 shares of stock were later transferred upon the books of said corporation from Briesen & Knauth to Briesen & Schrenk and a certificate or certificates for such number of shares duly issued and delivered to said partnership of Briesen & Schrenk. On or about February 21, 1916, said German Corporation caused 4,250 additional shares of said block of 13,490 to be transferred upon the books of said corporation in the name of said Briesen & Schrenk and certificates therefor were duly issued, so that there then stood, after said transfers, 6,750 of said shares in the name of Briesen & Schrenk and 6,740, being the remainder of said 13,490, in the name of said German Corporation and said shares of stock thus stood upon the books of said Corporation at the time that complainants purchased from said German Corporation 12,825 of said shares.

X. Prior to and at the time of the making of said purchase of said 12,825 shares of stock, the complainants were aware of the fact that a certificate of stock in the name of said German Corporation and representing the shares of stock which were the subject of said purchase was on deposit in the city of London; and complainants assumed that

possession of said certificate for purposes of surrender in connection with transfer of the shares of stock purchased by complainants probably could not be obtained so long as war between Germany and Great Britain should continue; and complainants further were aware of the fact that said certificates representing said shares might be the subject of seizure by the British Government and that so long as the war continued the ultimate transfer of said stock to complainants upon the books of the Superheater Company might be embarrassed or hindered or delayed by some action upon the part of the British Public Trustee or some one claiming under him and that complainants, as a result thereof, might be subjected to delay or become involved in litigation. Because of these considerations, complainants required that as part of the sale transaction it should be agreed between the vendor and them that the purchase price should not be payable until six months after the termination of the war (when complainants hoped that the anticipated difficulty above described would no longer exist) and it was agreed that in the meantime the shares should be held by Messrs. Briesen & Schrenk, as trustees for the complainants, and the dividends accumulated in a bank (Leu & Co., a Swiss banking corporation) so that they could be applied at the proper time on account of the purchase price, with the exception of 1 per centum of such dividends which were to be paid over to the complainants as received in order to enable them to defray any expenses which they might incur in the transaction pending the final payment of the purchase price. Certain contracts embodying these provisions, among others, were accordingly executed and delivered in Zurich, Switzerland, on the 8th day of November, 1916, and translations thereof are here annexed. They are [fol. 6] the contract of sale between the complainants and the German Corporation, marked "Exhibit A"; agreement between the complainants and Messrs. Briesen & Schrenk, constituting the latter trustee for the complainants, marked "Exhibit B"; and agreement between the complainants and the German Corporation and Leu & Co., respecting accumulation of dividends, marked "Exhibit C." Inasmuch as the copartnership agreement between your complainants is, by reference, incorporated in the agreement last above named, a translation of said co-partnership agreement is also an-

nexed hereto, marked "Exhibit D." The agreement "Exhibit B" was, however, not executed by Messrs. Briesen & Schrenk in Switzerland, but, after execution by complainants, was forwarded by them to Messrs. Briesen & Schrenk in the United States and there executed by them.

XI. As above set forth, at the time when the said sale was made, to-wit, on November 8, 1916, 6,750 shares out of said block of 13,490 shares originally represented by said certificate No. 134 were registered upon the books of said Superheater Company in the name of said Briesen & Schrenk, and thereafter, in order that the vendor the said German Corporation, might make delivery of the total of 12,825 shares to Briesen & Schrenk to be by them held as trustees for complainants pursuant to the terms of the contracts aforesaid, it was necessary for said German Corporation to cause to be transferred to Briesen and Schrenk only 6,075 additional shares. Such transfer was accordingly authorized and directed by said German Corporation in a writing dated November 8th, 1916, and addressed by it and thereafter delivered to the Superheater Company, a copy of which is hereto annexed and marked "Exhibit E." Such shares were thereafter duly transferred upon the books of said Superheater Company into the name of said Briesen and Schrenk and a certificate therefor, being certificate No. 389, was issued and delivered to said Briesen & Schrenk on or about the 29th day of December, 1916. Through some error, however, there was thus transferred and delivered to said Briesen & Schrenk 6,025 instead of 6,075 shares, or 50 less than the number of shares purchased by complainants. As a result of these transactions and transfers, said Briesen & Schrenk held from said date, to wit: the 29th day of December, 1916, until the cancellation of said certificates as hereinafter stated, certificate No. 351 for 4,250 shares, certificate No. 353 for 2,500 shares, and certificate No. 389 for 6,025 shares, making a total of 12,775 shares; and said Briesen & Schrenk forthwith accepted the trusteeship conferred upon them by the instruments aforesaid with respect to such shares of stock and proceeded to perform their duties thereunder.

In addition, said Superheater Company, on or about said 29th day of December, 1916, issued certificate No. 390 for

715 shares of stock in the name of said German Corporation. Said 715 shares constituted the remainder of said block of 13,490 shares theretofore represented by certificate No. 134 as aforesaid and included the 50 remaining shares of the stock of said corporation purchased by the complainants which, through some error, as aforesaid, were not transferred to said Briesen & Schrenk on said date.

XII. On information and belief, the said Superheater Company, in order to protect itself against any claim which might possibly be made through said certificate No. 134 for [fol. 7] 13,490 shares, which then was still outstanding, or through any claim by anyone then in possession or who might thereafter secure possession of said certificate, required as a condition to the issuing and delivering of the said certificates No. 351 for 4,250 shares, No. 353 for 2,500 shares, No. 389 for 6,025 shares, No. 390 for 715 shares, that the said certificates, together with assignments thereof, be deposited with Commercial Trust Company of New Jersey, subject to the order of the Board of Directors of said Superheater Company. This condition and requirement, however, was not in any way in derogation of the title of complainants, the purchasers of said 12,825 shares, nor because of any question as to the validity of the title of complainants to said shares acquired by said purchase, but, as aforesaid, was simply done as an added precaution to protect the corporation from any claim which might possibly be made based upon the said outstanding certificate No. 134.

XIII. On information and belief, on or about February 14, 1918, the Alien Property Custodian seized the 715 shares of the stock of the said Superheater Company standing in the name of the said German Corporation and represented by said certificate No. 390, together with the said certificate itself, and said custodian thereupon surrendered said certificate No. 390 to said Superheater Company and required that said shares of stock be transferred to said custodian or to a depository for him. Accordingly, said certificate No. 390 was cancelled and said shares of stock were transferred upon the books of said corporation into the name of said custodian or into the name of a depository for him (complainants not being informed definitely with regard thereto) and certificate No. 449 representing said shares as thus

transferred was issued by said corporation and delivered to the Alien Property Custodian.

XIV. On information and belief, subsequent thereto and on or about the 18th day of July, 1918, the Alien Property Custodian caused, procured, and compelled the said Superheater Company to cancel certificates Nos. 351, 353, and 389 and to reinstate upon its books certificate No. 134. Said Superheater Company, acting in compliance therewith, did in fact, by vote of its board of directors on or about the 18th day of July, 1918, require said Commercial Trust Company of New Jersey to surrender to said corporation said three certificates and the said certificates were cancelled and certificate No. 134, representing the said 13,490 shares, was attempted to be reinstated upon the books and records of said corporation. The Alien Property Custodian thereafter, on or about the 2nd day of August, 1918, surrendered to the said corporation the said certificate No. 449 for the said 715 shares and took into his possession the total of said 13,490 shares which had been represented by said certificate No. 134 as aforesaid. In furtherance of said seizure of said shares of stock, the said Alien Property Custodian, on or about August 21, 1918, and January 17, 1919, caused further demands or requirements to be served upon said Superheater Company purporting and attempting to seize the said 13,490 shares previously represented by said certificate No. 134 as aforesaid, and said custodian pursuant thereto caused and required said corporation to cancel upon its books and records all of the certificates previously issued representing the said 13,490 shares and to transfer upon [fol. 8] the books of said corporation all of said 13,490 shares (including, as aforesaid, the 12,825 shares of stock belonging to the complainants) in the name of said custodian. The said demands and requirements of the Alien Property Custodian were issued and done pursuant to determination made by him that the said 13,490 shares belonged to or were held by, for, on account of, or on behalf of, or for the benefit of said Schmidt'sche Heissdampf-Gesellschaft, an enemy within the purview of said trading with the enemy act, amendments thereto, and the proclamations and Executive orders issued thereunder. Pursuant to said requirements said corporation issued to the said Alien

Property Custodian certificate No. 482 for 13,525 shares of its capital stock, the said shares thus represented being 12,825 shares of stock belonging to complainants as aforesaid, and the remainder of the said 13,490 shares together with certain other additional shares making a total aggregate number of 13,525. The complainants, however, are not concerned with any of said shares of stock over and above the 12,825 purchased and owned by them as aforesaid.

XV. From January 1st, 1917, to and including April 30th, 1918, the Superheater Company paid to Messrs. Briesen & Schrenk all the dividends declared and payable upon the 12,775 shares of stock standing in their name. That on or about August 21st, 1918, Messrs. Briesen & Schrenk had in their hands, belonging to complainants, $489,000 par value of Liberty bonds and $36,830.39 in cash representing proceeds of such dividends plus interest and less the expenses of Messrs. Briesen & Schrenk. The said bonds consisted of United States Liberty bonds of the second issue of the aggregate par value of $439,000, and United States Liberty loan bonds of the third issue of the aggregate par value of $50,000. What interest coupons were attached to any part of said bonds at the time they were thus delivered the complainants are not advised nor informed. Messrs. Briesen & Schrenk had not transmitted said dividends to Leu & Co. in pursuance of the provisions of the trust agreement "Exhibit B" because the Superheater Company had requested that since the aforesaid certificate No. 134 for 13,490 shares, which was in England, was still outstanding, the said company would prefer that said dividends should be kept by Messrs. Briesen & Schrenk in this country, to which course Messrs. Briesen & Schrenk accordingly obtained the assent of the complainants. On or about August 21, 1918, the Alien Property Custodian seized the said bonds held by Messrs. Briesen & Schrenk as aforesaid and required them to pay to him the said sum of $36,830.39 so held by them upon the determination by the said custodian that the said bonds and the said sum of money belonged to or were owing to or were held for or on account of or on behalf of or for the benefit of said Schmidt'sche Heissdampf-Gesellschaft, an enemy.

XVI. Dividends on said 12,775 shares, amounting to $63,875 and belonging to complainants, became payable to Messrs. Briesen & Schrenk on July 3rd, 1918, and dividends amounting to a like amount, belonging to complainants, became payable to Messrs. Briesen & Schrenk on July 30th, 1918, but the Superheater Company did not immediately pay the said dividends to Messrs. Briesen & Schrenk, and before these moneys, aggregating $127,750 had been paid to them the Alien Property Custodian, on or about No- [fol. 9] vember 12th, 1918, required the said sum of $127,750 to be paid to him pursuant to determination by him that the same belonged to or was owing or was held for or on account of or on behalf of or for the benefit of said Schmidt'sche Heissdampf-Gesellschaft, an enemy.

XVII. On information and belief, that thereafter on or about October 29th, 1918, the Alien Property Custodian received from Locomotive Superheater Company $64,125, and on or about February 10th, 1919, a like sum (making a total of $128,250) as dividends declared upon the 12,825 shares of complainants' stock subsequent to seizure thereof by the Alien Property Custodian. The Alien Property Custodian therefore received in all, as representing dividends on said 12,825 shares, $489,000 in Liberty bonds and $292,830.39 in cash, and may have received other dividends of which complainants have no knowledge. Included in the amount of the two dividends above described are dividends in respect to said additional 50 shares purchased and owned by complainants, but never transferred to Messrs. Briesen & Schrenk, which 50 shares were originally represented by said certificate No. 390 standing in the name of the German corporation and seized by the Alien Property Custodian as aforesaid.

XVIII. Upon information and belief, on or about January 23, 1919, the said Alien Property Custodian undertook and purported to sell to Walker D. Hines, Director General of Railroads for the United States, 14,178 shares of the capital stock of said Superheater Company, which included the entire 12,825 shares of the stock of said corporation purchased by and belonging to complainants, as aforesaid, and the remainder of said block of 13,490 shares and additional shares of said stock seized by the custodian,

making an aggregate of 14,178 shares. The purchase price at and for which said shares of stock was sold was the sum of $200 per share, or an aggregate of $2,835,600, of which sum of $2,565,000 represented the purchase price, at $200 per share, of the 12,825 shares belonging to complainants. Thereafter, the said purchase price was by the said Walker D. Hines as Director General of Railroads paid to the Alien Property Custodian and on or about February 18, 1919, there was issued by said Locomotive Superheater Company to said "Walker D. Hines, Director General of Railroads for the United States," certificate No. 487 for 14,178 shares of the capital stock of said Locomotive Superheater Company, which included the 12,825 shares of such stock belonging to complainants above referred to, and certain other additional shares of stock with which the complainants are not concerned.

XIX. On information and belief, that thereafter, and on or about the 10th day of January, 1921, the said John Barton Payne, Director General of Railroads, purported to sell the said 14,178 shares of the capital stock of said Locomotive Superheater Company represented by the said certificate No. 487 and including the 12,825 shares belonging to complainants, to said Locomotive Superheater Company, the corporation issuing such shares, at and for the purchase price of $248 per share, making an aggregate purchase price for the said 12,825 shares belonging to the complainants of $3,180,600, and on or about said date said [fol. 10] purchase price was by said Locomotive Superheater Company paid to said John Barton Payne, Director General of Railroads.

XX. Upon information and belief, that between the 23rd day of January, 1919, the time when the said Walker D. Hines, Director General of Railroads, purported and attempted to purchase from the Alien Property Custodian the said 12,825 shares of stock belonging to complainants and the said 10th day of January, 1921, when the said John Barton Payne attempted to sell and transfer the same to the said Locomotive Superheater Company, there were from time to time dividends declared by said Locomotive Superheater Company upon said shares of stock from time to time certain sums of money on account thereof and pur-

porting to be such dividends were by said corporation paid to and received by the then Director General of Railroads. The exact amount so declared in dividends and so paid to and received by the Director General of Railroads is unknown to your complainants, except that such payments aggregated a large sum of money.

XXI. Under the laws of the Confederation of Switzerland, in force and effect now and at all the times hereinbefore mentioned, the effect of the performance and happening of such acts and transactions, and of the execution and delivery of such writings, as hereinbefore described, and the effect of the performance and happening of the particular acts and transactions and of the execution and delivery of the particular writings hereinbefore described was and is to invest the complainants, on November 8, 1916, with the ownership in prassenti of the 12,825 shares of stock hereinbefore mentioned, with the right to the dividends thereon from January 1st, 1917, subject to the retention of or possession of said stock and dividends by Messrs. Brisn & Schrenk, as trustees for the complainants, until the payment of the purchase price to the German corporation.

XXII. Complainants further aver and charge:

That the conclusions reached by the Alien Property Custodian and the determinations made by him as aforesaid, to the effect that the said 12,825 shares of stock of said Locomotive Superheater Company and the said Liberty bonds in the hands of said Briesen & Schrenk and the said money held by them representing dividends (plus interest and less expenses) upon the said shares of stock, together with dividends upon said shares of stock accumulated by said Superheater Company but not paid over to said Briesen & Schrenk, belonging to or were owing to or held for, on account of, on behalf of, or for the benefit of said Schmidt'sche Heissdampf-Gesellschaft, an enemy, were incorrect and erroneous in law and contrary to the facts;

That all of the acts and things done by the Alien Property Custodian in and about the seizure of said property and the requiring by him that the said shares of stock be delivered and transferred to him and that the said Liberty

bonds be delivered to him, and that the said sums of money representing dividends upon the said shares of stock be paid to him by said Briesen & Schrenk and by said Locomotive Superheater Company were wrongful and in violation of the rights of complainants as the owners of said shares of stock pursuant to said purchase from the said Schmidt-sche Heissdampf-Gesellschaft.

XXIII. Complainants further aver and charge upon information and belief and advice of counsel that the Alien [fol. 11] Property Custodian, in making said attempted and purported sale to the Director General of Railroads, made said sale, not at public sale to the highest bidder after public advertisement of the time and place of said sale, as required by the provisions of section 12 of the trading with the enemy act as amended, and by the proclamations and Executive orders of the President issued pursuant thereto, but that, on the contrary, said sale was made privately as a result of negotiations conducted privately and in secret between the Alien Property Custodian and the Director General of Railroads, and was made without any advertisement of any kind and without any notice of any kind to these complainants or any knowledge upon their part that said sale was about to be made or would be made;

That the then Director General of Railroads, in making the said attempted and purported purchase of said shares of stock from the Alien Property Custodian, was acting unlawfully and without authority and outside of and beyond the scope and purview of any right, power, or authority conferred upon him, and without any right or power or authority for or on behalf of the United States of America to purchase or otherwise acquire said shares of stock from the Alien Property Custodian.

XXIV. Complainants further aver upon information and belief that the purchase price of $2,835,600, being at the rate of $200 per share, attempted and purported to be paid by the said Director General of Railroads to the Alien Property Custodian for said 14,178 shares of stock, was attempted to be paid by the drawing of a check or voucher by the Director General of Railroads upon the then Treasurer of the United States against funds held by the Treasurer of the United States to the credit of the Director

General of Railroads, which draft or voucher was by the said Director General of Railroads made payable to the order of the Alien Property Custodian, and was delivered to that official and was by the Alien Property Custodian delivered to the then Treasurer of the United States, and the amount thereof was entered upon the records of the then Treasurer of the United States to the credit of the Alien Property Custodian for the account of the said Schmidt-sche Heissdampf-Gesellschaft and other persons who had been determined by the Alien Property Custodian to be the owners of the said 14,178 shares of stock. There was thus entered to the credit of the Alien Property Custodian for the account of said Schmidt-sche Heissdampf-Gesellschaft the sum of $2,565,000, being the said purported purchase price for the 12,825 shares of said stock purchased and then owned by complainants aforesaid, together with an additional sum on account of the purchase price for certain other shares of the capital stock of said corporation, with which these complainants are not concerned, which had been seized by the Alien Property Custodian as aforesaid as the property of said Schmidt'sche Heissdampf-Gesellschaft, an enemy. The said sum of $2,565,000, together with other and additional sums of money paid to the Alien Property Custodian by Briesen & Schrenk and by said Locomotive Superheater Company as aforesaid, is still entered upon the books of the Treasurer of the United States to the credit of the Alien Property Custodian for the account of said Schmidt'sche Heissdampf-Gesellschaft, an enemy. In so far as concerns the [fol. 12] said entries upon said books in respect of and to the amount of said sum of $2,565,000 as aforesaid, complainants further aver and charge, upon information and belief and advice of counsel, the said transaction amounted to and resulted simply in book entries which should be cancelled and annulled and disregarded because of the lack of authority upon the part of the then Director General of Railroads to purchase said stock, as was attempted to be done, and because of the manner in which said sale was made by the Alien Property Custodian in violation of the provisions of the trading with the enemy act, as aforesaid.

XXV. Complainants further aver and charge on advice of counsel that the result of the said transactions with

respect to said 12,825 shares of stock belonging to complainants was simply to transfer the possession and control thereof for the time being to the Director General of Railroads, but that said stransactions did not operate in any way to affect the title of complainants to said shares of stock, nor to defeat the right of complainants as the owners thereof to recover the said shares of stock.

XXVI. Complainants further aver and charge, upon information and belief, and upon advice of counsel; that the sum of $3,180,600, paid to the Director General of Railroads by Locomotive Superheater Company, being the purchase price at the rate of $248 per share for the 12,825 shares of stock belonging to complainants and attempted and purported to be sold by the Director General of Railroads to Locomotive Superheater Company, as aforesaid, together with the dividends paid by Locomotive Superheater Company to the Director General of Railroads as aforesaid, were by the Director General of Railroads paid over to the Treasurer of the United States, and the amounts thereof entered upon the records of the Treasurer of the United States to the credit of the Director General of Railroads; that the defendant Frank White now holds in his possession and custody and as a separate or segregated fund or funds and in a separate account or separate accounts the said sum of $3,180,600, together with the amount of dividends paid to the Director General of Railroads and by him paid over to the Treasurer of the United States as aforesaid; that the said defendant Frank White, although purporting and claiming to hold said sums of money as Treasurer of the United States, for the account of the Director General of Railroads, pursuant to the provisions of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes, and the acts supplementing and amending the same and the proclamations and Executive orders issued thereunder, nevertheless in fact holds said sums of money without any authority of law of any kind and is unlawfully and wrongfully withholding the same from complainants, to whom in equity said sums belong, and is wrongfully, unlawfully, and without authority of law crediting to

the account of the Director General of Railroads the said sums of money; and that said Director General of Railroads in asserting any right or claim to said moneys or any right to the use of the same, is acting unlawfully and without authority and outside of and beyond the scope and purview of any right or power or authority vested in him as Director General of Railroads, or otherwise.

[fol. 13] XXVII. Upon information and belief, the defendant Frank White and the defendant James C. Davis, purporting and asserting to act as Treasurer of the United States of America, and as Director General of Railroads, but without lawful right or power or authority, as aforesaid, unless restrained by order of this Court, will divert the said sums of money belonging to complainants and now held by defendant Frank White as aforesaid, to the uses and purposes of the defendant James C. Davis as Director General of Railroads and will dispose of said sums and place the same beyond the reach of complainants, to their irreparable injury and damage.

XXVIII. That said German corporation, Schmidt'sche Heissdampf-Gesellschaft, has for some time past been demanding payment from complainants herein of the sum agreed to be paid as purchase price for said 12,825 shares of stock, said German corporation contending that within the purview of the said contract for the purchase of said stock the treaty of peace between Germany and the allied and associated powers, known as the Versailles treaty of peace, constituted the termination of the war and that the said purchase price, therefore, became and was payable within six months after the signing of said treaty. In order to enforce demand for the payment of said sum, said German corporation heretofore brought suit in the Court of Justice of Peace at Zurich, Switzerland, which court was a court of competent jurisdiction for the bringing of said action against complaints herein, who were made defendants in said suit, and said case came up for hearing on the 22nd day of February, 1921. Complainants herein, defendants in said suit, contended that the time for the payment of said purchase price had not yet arrived and as a result thereof negotiations for the settlement of said action were begun, complainants herein having been advised

by counsel that the seizure of the said shares of stock by the Alien Property Custodian and the subsequent acts and things hereinbefore enumerated did not and would not constitute a defense to the said action for the payment of the purchase price for said shares of stock and that the only question which could be litigated was the question of time of payment. As a result of such negotiations, an agreement was entered into between said German corporation and complainants herein on or about April 6th, 1921, by which complainants agreed to pay 1,000,000 francs in cash not later than April 12, 1921, the balance to be due six months after the ratification of a treaty of peace between the United States and Germany, and the payment of said balance to be secured by good Swiss securities. The said sum of 1,000,000 francs was, by complainants herein, paid to said German corporation on April 12, 1921, as required by the terms of said agreement, and complainants herein will be required to pay in full the balance of said purchase price, as required by the terms of said agreement.

XXIX. Complainants have heretofore filed with the Alien Property Custodian a notice of their claim now sued upon under oath, and in such form and containing such particulars as the custodian has required, and a copy of said claim, marked Exhibit "F," is annexed hereto and made a part hereof. No application has been made by complainants to be President for an order for the payment, conveyance, transfer, assignment, or delivery to the complainants of the money and other property held by the [fol. 14] Treasurer of the United States claimed by complainants in this action.

XXX. Complainants, by reason of the matters and things hereinabove set forth, are entitled to have paid to them the said sum of $3,180,600, being the amount of the purchase price received from the sale of the said 12,825 shares of stock belonging to them (and to which they were entitled at the time of said sale by said Director General of Railroads) as aforesaid, together with the said Liberty bonds and the sum or sums of money paid to the Alien Property Custodian by Briesen & Schrenk and by said Locomotive Superheater Company, and together with the said sums of money paid to said Director General of

Railroads by said Locomotive Superheater Company, together with any and all other sums of money or rights or beneficial interest received by the Alien Property Custodian or the Director General of Railroads for or on account of said shares of stock or as income therefrom or profits thereon, together with interest thereon. In order that complainants may be assured of securing, upon the final determination of this cause, the money, Liberty bonds, and other rights and benefits to which they are entitled, it is necessary that the said Liberty bonds and interest thereon, and the said sum or sums of money now held by the defendant Frank White, be retained intact and not delivered, paid out, or distributed by him until the final determination of this suit, but unless restrained by the order of this court, said defendant will pay out all or part of sum or sums of money held by him and distribute said bonds, or otherwise dispose of the same, and distribute or pay over the other rights or benefits, if any, belonging to these complainants and now held by him.

Wherefore, complainants pray:

1. That process issue and be served upon the defendants and each of them requiring them to appear and make answer hereto, but not under oath, answer under oath being expressly waived.

2. That it be decreed that the sum of $3,180,600, being proceeds of sale of the stock of complainants as aforesaid, together with the bonds, moneys, and dividends, hereinbefore described, are illegally possessed and retained by the defendant Frank White.

3. That the defendants, Frank White, both individually and as Treasurer of the United States, and James C. Davis, both individually and as Director General of Railroads, and Thomas W. Miller as Alien Property Custodian, be required to account to complainants for the said sum of $3,180,600, being proceeds of sale of complainant's stock, as aforesaid, and also for said bonds and interest thereon moneys, and dividends, as aforesaid, including not only the dividends specifically hereinbefore described, but also all other dividends at any time received by said defendants, or any of them, or by any predecessor in office of either or

all of them, in respect to the 12,825 shares of complainants' stock, together with interest upon all of said sums and interest upon said bonds.

4. That the defendants Frank White and James C. Davis and Thomas W. Miller as Alien Property Custodian be required forthwith to pay over and deliver to complainants, or to cause to be paid over or delivered to them the said sum of $3,180,600, together with the said bonds, and also such additional sums of money as shall be found to be property of complainants, received by said defendants or any of [fol. 15] them, or by any predecessor in office of either or all of them, by way of dividends upon said 12,825 shares of stock or interest upon said Liberty bonds, or in any other way in respect thereof, together with interest thereon.

5. That it be decreed that defendants Arthur von Briesen, Fritz von Briesen, Hans von Briesen, and Otto von Schrenk, individually and as copartners under the name of Briesen & Schrenk, have no beneficial interest in nor right to the possession, custody, or control of any of the money, Liberty bonds, or other property involved in this litigation as against these complainants.

6. That the defendants Frank White and James C. Davis and Thomas W. Miller as Alien Property Custodian be required to hold, pending the final determination of this action, and to be disposed of as shall finally be decreed in this action, the sum of $3,180,600 and also said Liberty bonds, together with any additional sum or sums of money received by any of said defendants, or by any predecessor in office of any of said defendants, by way of dividends or otherwise upon said 12,825 shares of stock, or in any other way in respect thereof, together with the interest received upon said Liberty bonds and together with interest upon said sums of money from and after the receipt thereof.

7. That said defendants Frank White and James C. Davis and Thomas W. Miller as Alien Property Custodian forthwith be enjoined and restrained, until further order of this court, from transferring, assigning, delivering, paying out, or in any other way disposing of the said sum of $3,180,600, and said Liberty bonds with the interest thereon, together with any additional sum or sums of money re-

ceived by any of said defendants, or by any predecessor in office of any of said defendants, by way of dividends or otherwise upon the said 12,825 shares of stock, or in any other way in respect thereof; that the said defendants, and each of them be required to appear before one of the justices of this court, sitting in equity, at a time to be fixed in said order, and then and there to show cause, if any they have, why, pending the trial and determination of this action, and until otherwise ordered herein, the defendant Frank White should not be ordered and directed to segregate and hold separate from any other money or Liberty bonds now held by him, the said sum of $3,180,600, being proceeds of the sale of complainants' stock as aforesaid, together with the said Liberty bonds and the interest thereon, and all sums of money at any time received by said defendant, or by any predecessor in office of said defendant, in respect to the said 12,825 shares of complainants' stock, and why the said defendant Frank White and the defendant James C. Davis, and the defendant Thomas W. Miller as Alien Property Custodian, should not be enjoined and restrained, during the trial of this cause and until the final determination thereof, and until otherwise ordered by this court, from transferring, assigning, delivering, paying over or otherwise disposing of any of the said sums of money and/or the said Liberty bonds.

8. That complainants have such other and further relief as to the court may seem just and equitable in the premises [fol. 16] and to which they shall prove themselves entitled.

Lyttleton Fox, Solicitor for Complainants.

Duly sworn to by Lyttleton Fox. Jurat omitted in printing.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO DISMISS AND ANSWER ON BEHALF OF THOMAS W. MILLER, &C.—Filed July 10, 1924

* * * * * * *

I

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of

the United States, and, by leave of court heretofore secured permitting them to plead or otherwise to raise in their answers, all questions of law arising upon the face of the amended bill of complaint, and which could have been raised by motions to dismiss, separately filed, move to dismiss the amended bill of complaint, and as grounds for the said motion assign the following:

(1) It appears affirmatively from the allegations of the amended bill of complaint that the plaintiffs are not entitled to the unconditional delivery to them of those shares of capital stock of the Locomotive Superheater Company, [fol. 17] which are the subject matter of this suit, or to the payment to them of the proceeds of the sale of such stock.

(2) It appears affirmatively from the allegations of the amended bill of complaint that the plaintiffs have no right, title, or interest in and to the said stock, but are only parties to an executory contract providing, upon conditions, for the delivery to them of the afore-mentioned shares of stock at a date in the future, which date has not arrived.

(3) It appears affirmatively from the allegations of the amended bill of complaint that the plaintiffs herein have elected to pursue a cause of action against the United States other than as provided for under section 9 of the trading with the enemy act as amended.

(4) It appears affirmatively from the allegations of the bill of complaint that the plaintiffs are endeavoring to maintain a suit against the United States which is without warrant of law.

(5) It does not appear from the allegations of the amended bill of complaint that the plaintiffs have offered to perform the conditions precedent to the delivery to them under the aforementioned executory contract of the shares of stock of stock which are the subject matter of this suit.

(6) It appears affirmatively from the allegations of the bill of complaint that the right of the Alien Property Custodian to the possession of the aforementioned shares of stock as the property of an enemy, accrued priod to any right of the plaintiffs to possession of the same.

(7) It appears affirmatively from the allegations of the amended bill of complaint that the aforementioned contract was not prompted by commercial motives nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid inconvenience which otherwise might ensue from a state of war, and that the parties intended to leave the beneficial ownership in the German corporation and not to pass it to the plaintiffs.

(8) The plaintiffs have not stated facts sufficient to entitle them to equitable relief under section 9 of the trading with the enemy act.

II

And now not waiving the many defects and insufficiencies of the amended bill of complaint, but insisting upon each and all of the objections thereto set forth hereinbefore, these defendants for answer to the amended bill of complaint, separately and severally say:

(1) These defendants are without knowledge as to the allegations of paragraph numbered I of the amended bill of complaint, and therefore demand strict proof thereof.

(2) They admit the averments of paragraph numbered II of the amended bill of complaint.

(3) They admit the averments of paragraph numbered III of the amended bill of complaint.

(4) They admit the averments of paragraph numbered IV of the amended bill of complaint.

[fol. 18] (5) These defendants are without knowledge as to the allegations of paragraph numbered V of the amended bill of complaint, and therefore demand strict proof thereof.

(6) These defendants admit that the Confederation of Switzerland is not and never has been at war with the United States of America, but these defendants are without knowledge as to whether or not the plaintiffs are residents of the said Confederation, or as to whether or not the plaintiffs have ever been enemies of the United States, and therefore demand strict proof of such facts, if they be facts.

(7) These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph

numbered VII of the amended bill of complaint, and therefore demand strict proof thereof.

(8) These defendants are without knowledge as to the allegations of paragraph numbered VIII of the amended bill of complaint, and therefore demand strict proof thereof.

(9) These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph numbered IX of the amended bill of complaint, and therefore demand strict proof thereof.

(10) These defendants are without knowledge as to the allegations of paragraph numbered X of the amended bill of complaint, and therefore demand strict proof thereof.

(11) These defendants have no knowledge or information sufficient to form a belief with respect to the allegations of paragraph numbered XI of the amended bill of complaint, and therefore demand strict proof thereof.

(12) They have no knowledge or information sufficient to form a belief with respect to the allegations of paragraph numbered XII of the amended bill of complaint, and therefore demand strict proof thereof.

(13) These defendants admit the averments of paragraph numbered XIII of the amended bill of complaint, except that these defendants say that the seizure by the Alien Property Custodian referred to in the said paragraph was made after the Alien Property Custodian had determined, after investigation, that the Schmidt'sche Heissdampf Gesellschaft was an enemy within the meaning of the trading with the enemy act as amended, and that the said stock was held for, by, on acocunt of, on behalf of, and for the benefit of the said enemy.

(14) These defendants admit the averments of paragraph numbered XIV of the amended bill of complaint, except that they allege that said certificate No. 134 referred to in the said paragraph was, as a matter of fact, reinstated upon the books and records of the Locomotive Superheater Company, and that said certificate was surrendered by the Alien Property Custodian to the said company, and a new certificate issued therefor for 13,490 shares of the capital stock of the said company, and except further that these

defendants are without knowledge as to whether or not the shares of stock represented by certificate No. 134 include the 12,825 shares of said stock claimed by these plaintiffs, and except further that these defendants are without knowledge as to whether or not the plaintiffs herein were at any time the owners of any of the capital stock of the said company.

[fol. 19] (15) Answering the averments of paragraph numbered XV of the amended bill of complaint, these defendants say that on or about the 11th day of October, 1918, Messrs. Briesen & Schrenk reported to the Alien Property Custodian that they held in the name of the plaintiffs United States Liberty bonds, second issue, $439,000 par value, and United States Liberty bonds, third issue, $50,000. Thereafter the Alien Property Custodian, after investigation determined that Schmidt'sche Heissdampf Gesellschaft was an enemy within the purview and meaning of the trading with the enemy act as amended, and that $439,000 United States Liberty bonds, second issue, and $50,000 United States Liberty bonds, third issue, together with any interest received upon the said bonds, were by Briesen & Schrenk held for, by, on account of and for the benefit of the said enemy, and thereupon the Alien Property Custodian required the said bonds and interest thereon received, to be conveyed, transferred, assigned, delivered, and/or paid to him. The requirements of the Alien Property Custodian were fulfilled and he received from the said Briesen & Schrenk the sum of $36,830.39 and $439,000 United States Liberty loan bonds, second issue, and $50,000 United States Liberty loan bonds, third issue.

Further answering the said paragraph these defendants say that they are without knowledge as to any of the other allegations of the said paragraph, and therefore demand strict proof thereof.

(16) Answering the averments of paragraph numbered XVI of the amended bill of complaint, these defendants say that on or about the 30th day of October, 1918, the Alien Property Custodian received from the Locomotive Superheater Company a check in the amount of $127,750 issued by the Locomotive Superheater Company and Messrs. Briesen & Schrenk jointly. The said money was paid to the Alien Property Custodian pursuant to determination after

investigation made by him that the said money was held for, by, on account of or for the benefit of Schmidt'sche Heissdampf Gesellschaft, an enemy.

Further answering said paragraph these defendants say that they are without knowledge as to any of the other averments of the said paragraph, and therefore demand strict proof thereof.

(17) Answering the averments of paragraph numbered XVII of the amended bill of complaint, these defendants say that on or about the 29th day of October, 1918, the Alien Property Custodian received from the Locomotive Superheater Company check No. 1526 for $63,875, same being dividend of 5% declared by said company, payable October 29, 1928, on 12,775 shares of the capital stock of the said company, standing in the name of the Alien Property Custodian. Under date of February 10, 1919, the Locomotive Superheater Company remitted to the Alien Property Custodian check No. 1667 for $63,875, same being dividend of 5% declared by said company, payable February 10, 1919, upon 12,775 shares of the stock of the said company, standing in the name of the Alien Property Custodian.

Further answering the said paragraph these defendants say that they are without knowledge as to the other allegations contained therein, and therefore demand strict proof thereof.

(18) Answering the averments of paragraph numbered XVIII of the amended bill of complaint, these defendants [fol. 20] say that on or about the 23rd day of January, 1919, the Alien Property Custodian sold to the United States of America 14,178 shares of the capital stock of the Locomotive Superheater Company, the purchase price thereof being $200 per share, the custodian thus receiving the sum of $2,835,600, which was, pursuant to law, deposited in the Treasury of the United States.

Further answering said paragraph these defendants say they are without knowledge as to any of the other allegations of the said paragraph, and therefore demand strict proof thereof.

(19) The allegations of paragraph numbered XIX of the amended bill of complaint are immaterial and irrelevant to this cause of action in view of the decision of this court

as affirmed by the Court of Appeals of the District of Columbia upon the application of these defendants for an injunction pendente lite in this cause.

(20) The allegations of paragraph numbered XX of the amended bill of complaint are immaterial and irrelevant to this cause of action in view of the decision of this court as affirmed by the Court of Appeals of the District of Columbia upon the application of these defendants for an injunction pendente lite in this cause.

(21) These defendants are without knowledge as to the allegations of paragraph numbered XXI of the amended bill of complaint, and therefore demand strict proof thereof.

(22) Upon information these defendants deny the allegations of paragraph numbered XXII of the amended bill of complaint.

(23) In so far as the allegations of paragraph numbered XXIII of the amended bill of complaint are not conclusions of law, these defendants say that the said sale was made not to the Director General of Railroads but to the United States of America, and that pursuant to the provisions of section 12 of the trading with the enemy act a sale by the Alien Property Custodian to the United States of America is not required to be made at public auction.

(23-a) These defendants are without knowledge as to the allegations of paragraph numbered XXIII (a) of the amended bill of complaint, and therefore demand strict proof thereof.

(24) Answering the averments of paragraph numbered XXIV of the amended bill of complaint, these defendants say that the Alien Property Custodian received from the United States of America the purchase price of the said stock at the rate of $200 per share; that the said amount was paid by check drawn by the Director General of Railroads, and that the said money representing the said purchase price was deposited to the credit of the Alien Property Custodian in the Treasury of the United States pursuant to law.

Further answering the said paragraph, these defendants deny each and all of the other averments of the said paragraph.

(25) The averments of paragraph numbered XXV of the amended bill of complaint are statements of law which these defendant are not required to answer.

(26) The allegations of paragraph numbered XXVI of the amended bill of complaint are immaterial and irrelevant to this cause of action in view of the decision of this court as affirmed by the Court of Appeals of the District of Co-
[fol. 21] lumbia upon the application of these defendants for an injunction pendente lite in this cause.

(27) The allegations of paragraph numbered XXVII of the amended bill of complaint are immaterial and irrelevant to this cause of action, in view of the decision of this court as affirmed by the Court of Appeals of the District of Columbia upon the application of these defendants for an injunction pendente lite in this cause.

(28) These defendants are without knowledge as to the allegations of paragraph numbered XXVIII of the amended bill of complaint, and therefore demand strict proof thereof.

(29) They admit the averments of paragraph numbered XXIX of the amended bill of complaint.

(30) These defendants deny the averments of paragraph numbered XXX of the amended bill of complaint.

Wherefore, having fully answered the amended bill of complaint, these defendants pray that they be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be justly entitled.

Thomas W. Miller, Alien Property Custodian.
Frank White, Treasurer of the United States.
Peyton Gordon, Attorney of the United States in and for the District of Columbia.

Duly sworn to by Thomas W. Miller and Frank White. Jurat omitted in printing.

[fol. 22] IN SUPREME COURT OF DISTRICT OF COLUMBIA

REPORT OF SPECIAL MASTER—Filed May 20, 1927

* * * * * * *

This cause has been referred to me by an order of the above court, appointing me special master, to hear this

cause and to report to the court findings of fact and conclusions of law, together with the evidence.

After oral hearings, the introduction of evidence in behalf of the respective parties, and arguments of counsel, supplemented by briefs, I have considered the record in the case, and from that record make the following

Findings of Fact

1. The three original plaintiffs, Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, on the 8th day of November, 1916, and continuously thereafter up to the time of the filing of the bill of complaint herein were each of them citizens of the Confederation of Switzerland, and residents of the city of Zurich. The said Jak. Robert Sigg-Fehr continued to be a citizen of the Confederation of Switzerland, and resident of the city of Zurich therein, up to the time of his death subsequent to the filing of the bill of complaint herein, and thereafter Henry Escher, Esq., was duly appointed ancillary administrator in the District of Columbia of the estate of said plaintiff, Jak. Robert Sigg-Fehr, and as such was substituted as plaintiff herein in the place of Jak. Robert Sigg-Fehr, deceased. Said Gottfried Rudolph Baumann-Kienast and said Edmund Gams have continued from the time of the filing of the bill of complaint up to the date hereof to be citizens of the Confederation of Switzerland and residents of the city of Zurich therein.

2. Said three plaintiffs at the time of the filing of the bill of complaint herein were each of them neither an enemy nor ally of an enemy of the United States within the meaning of those terms as used in the trading with the enemy act, and no one of them has been at any other time an enemy or ally of an enemy of the United States within the meaning of the trading with the enemy act.

3. The defendants, Arthur, Fritz, and Hans von Briesen and Otto von Schrenk, on the 8th day of November, 1916, were citizens and residents of the State of New York, and members of the bar of the State of New York and copartners engaged in the practice of law in the city of New York, and continued to be such up to the time of the filing of the bill of complaint herein and thereafter up to the present time.

4. Locomotive Superheater Company, at the times of the transactions mentioned in the bill of complaint and at the time of the filing of the bill of complaint herein was a corporation organized under the laws of the State of Delaware. Subsequently thereto its corporate name was changed to The Superheater Company. This company is hereafter referred to as the Superheater Company.

5. Schmidt'sche Heissdampf-Gesellschaft, at the times of the various transactions involved herein, was and is a German corporation, doing business in Kassel, Germany. This [fol. 23] corporation is hereinafter referred to as the German Corporation. On the 20th day of March, 1913, said corporation was the owner of 13,490 shares of the capital stock of said Superheater Company, of the par value of $100 per share, and on said date there was issued to said German corporation one certificate, No. 134, for said number of shares. This certificate, at some time prior to October 2, 1914, was deposited by the German corporation with the London agency of the Deutsche Bank, a corporation organized under the laws of the German Empire, and having its principal place of business in Germany. This certificate was not then endorsed, nor was it ever thereafter endorsed by the German corporation.

6. On or about October 2d, 1914, at the request of the German corporation, this certificate No. 134 was canceled upon the books and records of the Superheater Company without surrender of the original certificate, which remained on deposit as aforesaid, and there were issued, on October 13, 1914, in lieu thereof, certificate No. 288, for 2,500 shares of stock, in the name of Briesen & Knauth, a copartnership of the city of New York, and certificate No. 289, for 10,990 shares, in the name of the German corporation. These two certificates were issued upon the condition that certificate No. 288, for 2,500 shares, in the name of Briesen & Knauth, could be canceled in case original certificate No. 134, for 13,490 shares, with assignment thereof duly executed, should be presented to the Superheater Company for transfer. For the purpose of enabling the Superheater Company to carry out this arrangement, Briesen & Knauth returned certificate No. 288 with a blank assignment duly signed by them to the Superheater Company, and, thereafter, this

certificate, with said assignment, and certificate No. 289, were deposited with Commercial Trust Company of New Jersey, subject to the order of the Superheater Company. Briesen & Knauth had no beneficial interest in the shares thus transferred into their name but held the same as trustees or agents for the German corporation. Thereafter the firm of Briesen & Knauth was dissolved by the death of the said Knauth, and said firm was succeeeded by the partnership of Briesen & Schrenk, the members of which said firm are named as defendants in the bill of complaint herein.

7. Thereafter, on or about the 24th day of February, 1916, said certificate No. 288, for 2,500 shares, was canceled, and, in lieu thereof, certificate No. 353, for 2,500 shares, was issued to Briesen & Schrenk, and, on the same day and at the request of the German corporation, said certificate No. 289, for 10,990 shares issued to the German corporation, said certificate No. 289, for 10,990 shares issued to the German corporation, was canceled, and, in lieu thereof, two certificates were issued, one, No. 351, for 4,250 shares, issued to Briesen & Schrenk, and the other, No. 352, for 6,740 shares, issued to the German corporation. These new certificates, Nos. 351, 352, and 353, together with blank assignment by Briesen & Schrenk of the certificates issued to them, were deposited in Commercial Trust Company of New Jersey, subject to the order of the Superheater Company and under agreement with Briesen & Schrenk that the Superheater Company might cancel these certificates in case the original certificate No. 134 should at any time thereafter be presented and legal claim for its cancellation and reissue be made. Briesen & Schrenk had no beneficial interest in any of the shares represented by the certificates issued in [fol. 24] their name but held the same as trustees or agents for the German corporation.

8. At some time prior to the 8th day of November, 1916, the date not being more accurately fixed by the evidence, the aforesaid London agency of the Deutsche Bank was placed under the supervision of the controller appointed by the Board of Trade of Great Britain pursuant to the laws of Great Britain then in full force and effect, and such supervision existed on November 8th, 1916, but the evidence does not disclose the character, extent, or effect of this

supervision, nor that it extended to the property of customers of the London agency, as distinguished from the property and assets of the bank itself.

9. On the 8th day of November, 1916, said certificates Nos. 134, 351, 352, and 353 were in the same status as when last hereinbefore mentioned, except to such extent, if any, as the facts found in the preceding paragraph affected the status of certificate No. 134, which was still in said London agency.

10. On the 8th day of November, 1916, at Zurich, Switzerland, and after negotiations of some two or three weeks, the German corporation entered into a certain agreement or contract of sale with the original plaintiffs, Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, hereinafter referred to as the Swiss firm, a correct translation of which into English is annexed to the bill of complaint as Exhibit "A," and which, omitting the authentication of the signatures, is in the words and figures following:

"Agreement of Sale

I

"The Schmidt'sche Heissdampf-Gesellschaft m. b. H. in Cassel-Wilhelmhöhe hereby sells 12,825 shares of the Locomotive Superheater Co. of New York at 200% with dividends from January 1st, 1917, to Messrs. Jak. Robert Sigg-Fehr, of Zurich, 2, Gartenstrasse 26, Gottfried Rudolf Baumann-Kienast, of Zurich in Stafe, and Edmund Gams, of Zurich in Zurich I, Theaterstrasse 12.

II

"The purchase price is payable in Swiss funds, six months after the conclusion of peace between the German Empire and those States now at war with it, as well as those who may hereafter enter the World War against it. The rate of exchange shall be that prevailing on the preceding day, Zurich-New York.

III

"Because of the deferring of the duty of payment, the shares of stock sold are not delivered to the purchaser for the present, but are transferred to an American firm as trustee until full payment of the purchase price. As long as this trust lasts, the trustee remains as owner of the shares of stock and shall be recorded as such on the books of the American corporation. The trustee shall exercise [fol. 25] the rights of owner of this stock under the direction of the purchasers.

IV

"The purchaser pledges himself not to alien nor to encumber the shares of stock during the trust. The trustee will see to the carrying out of this obligation because such trustee, during this time, retains possession of the shares and shall not convey them to anybody.

V

"During the same time, the dividends from January 1st, 1917, shall be collected by the corporation Leu & Co. in Zurich and shall pay to the purchasers only 1% of such amount of dividends. The balance shall be accumulated as security for the rights of the seller. Regarding the investment of this sum, which remains on deposit as security, appropriate instructions will be found in the trust agreement with Leu & Co.

VI

"The contract shall be governed according to Swiss law.

VII

"The place of performance for both parties is in Zurich.

VIII

"The contract is executed in triplicate.

Zurich, November 8, 1916.

Schmidt'sche H e i s s d a m p f-Gesellschaft mit beschrankter Haftung. Robert Sigg, R. Baumann, Ed. Gams, Dr. J. Eggers, Rentzsch."

11. On the same day, and contemporaneously therewith, the Swiss firm, at Zurich, Switzerland, executed another certain contract intended for subsequent execution by the firm of Briesen & Schrenk, defendants herein, and which was subsequently executed, in New York City, by said firm of Briesen & Schrenk as the other parties thereto, on the 3d day of February, 1917, and prior to the declaration of war between the United States and Germany. A correct translation into English of said contract between the firm of Briesen & Schrenk and the Swiss firm is annexed to the bill of complaint as exhibit "B," and, omitting the authentication of the signatures, is in the words and figures following:

"Contract

Between the firm of Briesen and Schrenk, 25 Broad Street, New York, on the one hand, and the Messrs. Jak. Robert Sigg-Fehr of Zurich in Zurich 2, Gartenstrasse 26, Gottfried Rudolf Baumann Kienast of Zurich in Stafa, and Edmund Gams of Zurich in Zurich 1, Theatrestrasse 12 [fol. 26] (hereinafter designated as the firm) on the other hand witnesseth:

"1.) The firm hereby appoints the firm of Briesen and Schrenk as trustee to take possession of 12,825 shares of the stock of Locomotive Superheater Co. and directs that the firm of Briesen and Schrenk shall be recorded in the stock register of the corporation as owners of these shares.

"2.) The firm of Briesen and Schrenk is authorized to appoint a subtrustee for a portion of the stock mentioned under paragraph 1.) hereof, but shall retain the right to vote thereon for itself. It may cause such subtrustee to be recorded in the stock register of the corporation as owner.

"3.) The firm of Briesen and Schrenk binds itself to take part in all general meetings of Locomotive Superheater and to execute its right to vote under the instructions of the firm. In the absence of special instructions from the firm, the firm of Briesen and Schrenk is authorized to act according to its own judgment.

"4.) The firm of Briesen and Schrenk further obligates itself:

"a.) To pay dividends on the aforementioned stock as received, to a New York bank for account of the firm and according to its instructions, and

"b.) Upon receipt of sufficient written notice of completion (gehorig vollzogene schriftliche Aufforderung) from the firm to transfer the shares of stock at any time to a person or firm designated by the latter.

"Subject, however, to the limitation that until the firm produces proof to the firm of Briesen and Schrenk of the payment in full of the purchase price for the shares of stock to the sellers, no disposition of the stock in any way other than the above shall take place.

"5.) The firm pledges itself to save harmless the firm of Briesen and Schrenk for all damages which that firm may suffer because of its assumption of this trust.

"6.) The duties assumed by the firm of Briesen and Schrenk under paragraph 4.) (subdivision a) will be imposed by that firm upon its subtrustee, while the right to dispose of the stock shall remain with the firm of Briesen and Schrenk.

"7.) The obligations under paragraph 5.) are assumed by the firm, also, as against the subtrustees to be appointed by the firm of Briesen and Schrenk.

"8.) The firm will bear all expenses connected with this contract.

"9.) This contract has been executed in duplicate, Zurich, November 8th, 1916.

Robert Sigg, R. Baumann, Ed. Gams."

12. On the said 8th day of November, 1916, and contemporaneously with the execution on said day of the contract of sale and agreement hereinbefore mentioned, the Swiss firm, the German corporation, and Leu & Company, a stock corporation in Zurich, engaged in the business of banking, entered into another agreement, at Zurich, Switzerland, a correct translation of which into English is annexed to the bill of complaint as Exhibit "C," and is in the words and figures following:

[fol. 27] "Memorandum of Agreement

1) The Messrs. Jak. Robert Sigg-Fehr, in Zurich, Gottfried Rudolf Baumann-Kienast and Edmund Gams, in Zurich, and 2) The Schmidt'sche Heissdampf-Gesellschaft m. b. H., Cassel, one party, and the stock corporation Leu & Co., in Zurich, another party, have duly made the following agreement:

Art. I

"The Schmidt'sche Heissdampf-Gesellschaft m. b. H. has, pursuant to the contract of sale of November 8th, 1916, transferred to the three above-named Zurich gentlemen 12,825 shares of stock of Locomotive Superheater Co., New York, and the three above-named gentlemen have formed a firm to carry through this business pursuant to a partnership agreement of November 8th, 1916. These two contracts (contract of sale and partnership agreement) form integral parts of the following agreement.

Art. II

"The three above-named Zurich gentlemen as a firm obligate themselves as against the corporation Leu & Co. to instruct their trustees in America to pay the dividends on the 12,825 shares of stock to the National City Bank, New York, for account of the corporation Leu & Co. after first deducting the compensation of such trustees and their representatives in the board of directors of Locomotive Superheater Co. This obligation shall not be cancelled or in any wise modified except with the agreement and consent of the corporation Leu & Co.

"The corporation Leu & Co. will place 1% of the dividends received to the credit of the firm; if such 1% shall be calculated on dividends received before deducting the compensation of the American trustees and their representatives in the board of directors of Locomotive Superheater Co.

"The balance of the dividends received shall be retained by the corporation Leu & Co. in an account upon which payment has been stopped in the name of the three above-named Zurich gentlemen as a firm and the Schmidt'sche

Heissdampf-Gesellschaft m. b. H. in such manner that same may be disposed of only upon the joint order of the two parties named in this account, or upon the order of one holding power of attorney for the other. The firm shall be represented through a managing member who is authorized to act for it in its dealings with the corporation Leu & Co. in all matters and who may sign for the firm.

[fol. 28] Art. III

"The corporation Leu & Co. assumes no liability for the collection of the dividends and is liable to the parties hereto only for the distribution of such dividends and the accrued interest thereon according to Art. II of this contract.

Art. IV

"The corporation Leu & Co. will credit the dividends as received in francs at the current rate of exchange and will allow interest thereon at the same rate as is fixed from time to time by the union of Zurich credit institutions for the district of Zurich on accounts subject to check.

"The two parties to the contract of sale are entitled jointly, to make any stipulations regarding the investment of the sums provided for herein.

Art. V

"The corporation, Leu & Co. shall receive a commission of ⅛% of the amounts of dividends received.

Art. VI

"This contract shall be governed by the Swiss law, and the parties chose the city of Zurich as the place of performance.

Art. VII

"This contract is executed in triplicate and one executed copy has been delivered to each contracting party.

Zurich, November 8, 1916.

Aktiengesellschaft Leu & Co., Dietler, Huber, Robert Sigg, R. Baumann, Ed. Gams. Schmidt'sche Heissdampf-Gesellschaft, Dr. J. Eggers, Rentzch."

13. On the said 8th day of November, 1916, and contemporaneously with the execution of the three preceding in-

struments aforesaid, the three original plaintiffs herein, at Zurich, Switzerland, executed a certain partnership agreement, a correct translation of which into English is annexed to the bill of complaint as Exhibit "D," and is in the words and figures following:

"Partnership Agreement

I

"The Messrs. Jak. Robert Sigg-Fehr of Zurich in Zurich 2, Gartenstrasse 26, Gottfried-Rudolf Baumann-[fol. 29] Kienast of Zurich in Stafa, and Edmund Gams of Zurich in Zurich 1, Theatrestrasse 12, have united themselves in a copartnership. Its purpose is to acquire 12,825 shares of the capital stock of Locomotive Superheater Co. of New York, pursuant to a contract of sale of November 8, 1916, which contract, together with the trust agreements belonging thereto, forms a part of this agreement. Changes regarding its purpose and scope are excluded.

II

"Regarding the dividends accruing after January 1st, 1917, to the members of the firm in equal parts, reference is made to the contract of sale and to the trust agreements.

III

"The business of the firm shall be conducted solely by the partner, Edmund Gams.

IV

"Should a partner die, his heirs shall enter the firm. Their interests, however, shall be taken care of solely through the corporation Leu & Co. in Zurich. Should the managing partner die, the corrying on of its business shall be entrusted to one of the surviving partners or to the corporation Leu & Co.

V

"If one of the partners or his heirs become bankrupt the remaining partners shall have the right to assume his rights and liabilities.

VI

"This firm may not be dissolved during the running of the contract of sale mentioned in Paragraph II.

VII

"Upon completion of the purpose for which this firm is formed, the shares of stock shall, after full payment of the purchase price, be divided among the partners in equal parts.

VIII

"In the event of dissolution, the managing partner shall conduct the liquidation.

"Zurich, November 8th, 1916.

"Robert Sigg, R. Baumann, Ed. Gams."

14. Notice of the aforesaid contract of sale and of the aforesaid agreement between the Swiss firm and Briesen & Schrenk, together with the request of the German corporation for the transfer of an additional block of 6,075 shares [fol. 30] of the capital stock of the Superheater Company into the name of Briesen & Schrenk was sent from Zurich, Switzerland, to the Superheater Company and to Briesen & Schrenk, by a messenger who arrived in the city of New York and gave such notice orally to the Superheater Company and to Briesen & Schrenk on or about the 29th day of December, 1916. In addition, the German corporation executed in Zurich, Switzerland, on November 8, 1916, two letters addressed to the Superheater Company and requesting the transfer of additional shares of the capital stock of the Superheater Company into the name of Briesen & Schrenk. These two letters, similar or substantially similar, were sent by separate mails to the Superheater Company, and one of them was received by that company in the month of January, 1917, and prior to the declaration of war between the United States and Germany. A correct translation into English of one of said letters is annexed to the bill of complaint as Exhibit "E," and, omitting the authentication of the signatures, is in the words and figures following:

"Schmidt'sche Heissdampf-Gesellschaft m. b. H.,
Cassel-Wilhelmshohe, November 8, 1916.

"Locomotive Superheater Co., 30 Church Street, New York:

"We request you herewith to transfer from our stock holdings in your society 6,075 shares of stock to Messrs. Briesen & Schrenk, 26 Broad Street, New York, or to a person or firm designated by that firm.

"For this assignment we assume that the same obligations as against you which we assumed in our writing of September 10, 1914.

"With respect,

"Schmidt'sche Heissdampf-Gesellschaft, Dr. F. Eggers, Rentzsch."

15. On the 30th day of December, 1916, as the result of the request of the German corporation, sent by messenger, as aforesaid, the aforesaid certificate No. 352, for 6,740 shares of the capital stock of the Superheater Company was canceled, and two certificates were issued in lieu thereof, one, No. 389, for 6,025 shares, to Briesen & Schrenk, and the other, No. 390, for 715 shares, to the German corporation. These certificates, Nos. 389 and 390, were issued under an agreement of the firm of Briesen & Schrenk with the Superheater Company that the certificates might be canceled by the Superheater Company either in case the original certificate, No. 134, for 13,490 shares, standing in the name of the German corporation, should at any time thereafter be presented and legal claim for its transfer be made, or in case the firm of Briesen & Schrenk should fail to present to the Superheater Company within six months proper transfer or authority, signed by the German corporation, for the transfer of said 6,025 shares to Briesen & Schrenk. The aforesaid letter of November 8, 1916, requesting said transfer and signed by the German corporation, was received by the Superheater Company within six months of the time of said transfer of December 30, 1916, and the aforesaid agreement of Briesen & Schrenk made in connection therewith.

16. On March 25, 1918, and while the aforesaid certificate No. 134 was still on deposit with the London agency of the [fol. 31] Deutsche Bank, an order of the Board of Trade of Great Britain was issued, pursuant to the provisions of section 4 of the trading with the enemy act of 1916 of Great

Britain, which order stated that it vested in the Custodian of Enemy Property for England the said certificate No. 134. In issuing this order the board of trade complied in all particulars with the requirements of the law of Great Britain then in full force and effect. Thereafter, on October 11, 1918, said certificate No. 134, still unendorsed, was delivered to the Custodian of Enemy Property for England.

17. The firm of Briesen & Schrenk, from the time of the transfers made to them as hereinbefore set forth, of the certificates aggregating 12,775 shares of the stock of the Superheater Company, under the circumstances and conditions hereinbefore related, and the execution by them, on February 3, 1917, of the aforesaid agreement with the Swiss firm, dated November 8, 1916, continued to hold said certificates as trustees, under and in accordance with the terms and provisions of said contract, until the cancellation of said certificates, as hereinafter set forth.

18. Under date of February 14, 1918, the Alien Property Custodian executed a demand and notice, under the provisions of the trading with the enemy act, as then in force, addressed to the Superheater Company, determining that the aforesaid certificate No. 390 for 715 shares of the stock of the Superheater Company, and the sum of $3,250, together with all dividends then in the possession of the Superheater Company on any of the stock on which said sum was paid, which might then have been or might thereafter be received or declared by the Superheater Company, and any interest accrued on said dividends to date of payment thereof to said Alien Property Custodian, were held by the Superheater Company as belonging to, or for the benefit of, the German corporation, which the custodian determined to be an enemy, not holding a license granted by the President, and it was required that said money and property should be delivered and paid over to the Alien Property Custodian. Service of this notice and demand was accepted by the Superheater Company on the 26th day of February, 1918.

19. Thereafter, under date of the 11th day of March, 1918, the Alien Property Custodian, under the provisions of the trading with the enemy act, addressed to Commercial Trust

Company of New Jersey a demand and notice that he had determined that the following property, to wit: Certificate for 715 shares of the capital stock of the Superheater Company, together with all dividends then in the possession of said trust company, if any, theretofore or thereafter received or declared by it on said shares of stock, and any interest accrued on said dividends to the date of payment to the Alien Property Custodian, were held by it as belonging to and for the benefit of, the German corporation, which was determined to be an enemy, not holding a license granted by the President, and it was required that the same be delivered and paid over to the Alien Property Custodian. Service of this notice and demand was accepted by the Commercial Trust Company of New Jersey on the 2d day of April, 1918. A new certificate for said 715 shares was issued to the Alien Property Custodian.

[fol. 32] 20. At a special meeting of the board of directors of the Superheater Company, held on July 18, 1918, the secretary reported that he had informed the Alien Property Custodian as to the facts known to the Superheater Company concerning the 12,775 shares of the capital stock of the company formerly represented by certificate No. 134, and later by certificates Nos. 353, 351, and 389, in the name of Briesen and Schrenk, and thereupon, and in accordance with the opinion of counsel, it was resolved that the Commercial Trust Company of New Jersey be directed to redeliver to the Superheater Company said certificates Nos. 353, 351, and 389, all registered in the name of Briesen & Schrenk, together with the accompanying assignments thereof, and that when received the same be canceled, that notation be made in the stock books and stock ledger that such cancellation was by order of the board; that the action taken by the board on October 2, 1914, directing the cancellation of certificate No. 134 be rescinded; that notation be made on the stock books and stock ledger that said certificate is reinstated, as evidencing 13,490 shares registered in the name of the German corporation, but that no transfer of said certificate should thereafter be made until duplicate certificate No. 449 for 715 shares, then registered in the name of the Alien Property Custodian, should likewise be surrendered.

21. Thereafter, under date of the 21st of August, 1918, the Alien Property Custodian, under the provisions of the trading with the enemy act, addressed to the Superheater Company a demand and notice that he had determined that the following property, to wit: 13,490 shares of its capital stock, was belonging to and held by it for the benefit of the German corporation, which he determined to be an enemy, not holding a license granted by the President, and he required that the same be delivered and paid over to the Alien Property Custodian. While not definitely disclosed by the evidence, it appears that this notice and demand was served on or about the 27th day of August, 1918.

22. At some time between the 1st day of November and the 7th day of December, 1918, the aforesaid certificate No. 134 was surrendered and delivered to the Alien Property Custodian of the United States by the Custodian of Enemy Property of England; and on December 7, 1918, the Alien Property Custodian of the United States surrendered said certificate No. 134 to the Superheater Company. Said certificate was thereupon marked canceled.

23. Under date of October 18, 1918, the Alien Property Custodian executed a demand and notice, under the provisions of the trading with the enemy act, addressed to the Superheater Company, determining that the sum of $127,750, together with any interest accrued thereon to date of payment to the Alien Property Custodian, belonged to and was held by the Superheater Company for the benefit of the German corporation, which was determined to be an enemy, not holding a license granted by the President, and it was required that the same should be delivered and paid over to the Alien Property Custodian. Service of this demand and notice was accepted by the Superheater Company on October 22, 1918.

24. Under date of October 23, 1918, the Alien Property Custodian executed a demand and notice, under the provisions of the trading with the enemy act, addressed to the Superheater Company and Briesen & Schrenk, determining [fol. 33] that the sum of $36,735.61, together with any interest accrued thereon to date of payment to the Alien Property Custodian, $439,000. United States Liberty loan bonds,

second issue, $50,000. United States Liberty loan bonds, third issue, together with any interest received on said bonds and any interest accrued on said interest to date of payment to the Alien Property Custodian, belonged to and was held for the benefit of the German corporation, which was determined to be an enemy, not holding a license granted by the President, and it was required that said money and property be delivered and paid over to the Alien Property Custodian. Service of this demand and notice was accepted October 22, 1918.

25. Thereafter, under date of the 17th day of January, 1919, the Alien Property Custodian executed a demand and notice under the provisions of the trading with the enemy act as then in force, directed to the Superheater Company, determining that certain shares of its stock, including therein those represented by certificate No. 133 for 12 shares, No. 150 for 23 shares, and No. 134 for 13,490 shares, were held in behalf of the German corporation, which was declared to be an enemy, not holding a license granted by the President, and it was demanded that the same be transferred, assigned, and delivered to the Alien Property Custodian, and that the company forthwith cancel upon its books and records all of the said shares of stock and in lieu thereof issue new certificates to the Alien Property Custodian, and such action, as thus demanded, was taken by the Superheater Company.

26. Subsequent to January 1, 1917, the Superheater Company declared certain dividends upon the 12,775 shares of stock which had been represented by certificate No. 134 and were then represented by the certificates issued in the name of Briesen & Schrenk and paid over to Briesen & Schrenk as such dividends, certain sums of money. The firm of Briesen & Schrenk purchased out of this money so received United States Liberty loan bonds of the par value of $489,000, and subsequently, but prior to the bringing of this suit, delivered over these bonds to the Alien Property Custodian and paid over to the Alien Property Custodian the sum of $36,735.61, being the balance of these monies remaining in their hands. These bonds and this money were delivered and paid over by Briesen & Schrenk to the Alien Property Custodian upon demand made by him, as

aforesaid, by virtue of the power and authority vested in him under the trading with the enemy act and upon a determination that the said bonds and the said money were owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of, the German corporation.

27. The Superheater Company, subsequently to January 1, 1917, declared, but did not pay over, certain dividends upon the shares of its capital stock described in the aforesaid agreement of sale of November 8, 1916. Said unpaid dividends were, prior to the bringing of this suit, seized by the Alien Property Custodian, as aforesaid, upon a determination made by him by virtue of the power and authority vested in him under the trading with the enemy act that the said dividends were owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of, the German corporation. The amount of these declared but unpaid dividends were, prior to the [fol. 34] bringing of this suit, paid over by the Superheater Company to the Alien Property Custodian upon demand by him.

28. On or about the 23d day of January, 1919, the Alien Property Custodian sold to the then Director General of Railroads for the United States, 14,178 shares of the capital stock of the Superheater Company, which included all of the shares seized by the Alien Property Custodian, as aforesaid, as belonging to or held for the benefit of the German corporation, the purchase price being $200 per share. The proceeds of said sale, and also the aforesaid dividends, consisting of cash and Liberty bonds, have since been held by the Alien Property Custodian, and/or the Treasurer of the United States, except for such amount, if any, as may have been paid therefrom as a result of proceedings pending in this court in that cause entitled "Fritz von Briesen et al. vs. A Certain Fund et al., Equity No. 40,190," wherein the defendants herein, Fritz von Briesen, Hans von Briesen, and Otto von Schrenk, have sought to establish a lien on the fund involved in this cause for compensation to them for their services as trustees.

29. Prior to the bringing of this suit, the three original plaintiffs filed with the Alien Property Custodian a notice

of their claim, under oath, and in such form and containing such particulars as the Alien Property Custodian required.

30. The members of the firm of Briesen & Schrenk, defendants herein, have filed an amended answer, disclaiming any interest in the money or property involved in this suit, and consenting to the entry of a decree in favor of the plaintiffs.

31. A disclaimer of any right, title, or interest in or to the money or property involved in this suit and an assent to the allowance of the claim of plaintiffs, duly executed by the German corporation subsequently to the filing of this suit, has been filed herein by plaintiffs.

32. There is no evidence in the record that the Custodian of Enemy Property of England had any right, power, or authority to make any gift or donation of any property seized by or delivered to him under the provisions of the trading with the enemy amendment act of 1916 of Great Britain, or that the Alien Property Custodian of the United States had any power, right, or authority to receive or accept any gift or donation from the Custodian of Enemy Property of England.

33. There is no evidence that there was any agreement or understanding of any nature or kind, either express or implied, between the German corporation and the Swiss firm at the time of, or in connection with, the contracts of November 8, 1916, other than those stated in the documents executed at the time and hereinbefore set forth.

34. Early in the year 1919 the Swiss firm retained New York counsel to represent them in pressing their claim for a restoration of the property seized by the Alien Property Custodian, as aforesaid, and such counsel have been diligent in the assertion of their clients' rights.

35. After the signing of the treaty of Versailles, on June 28, 1919, the German corporation communicated with [fol. 35] the Swiss firm, asserting their right to payment under the contract of November 8, 1916, six months after the conclusion of said treaty. The Swiss firm denied this right, and, in February, 1921, the German corporation filed suit in Zurich against the Swiss firm. On April 6, 1921, a compromise agreement was reached between the parties,

under the terms of which the Swiss firm paid the German corporation one million gold francs on account on April 11, 1921, and the time for the payment of the balance was postponed to July 1, 1922. By a later agreement this time was further postponed.

36. On July 2, 1921, peace was concluded between the United States and Germany.

37. According to the laws of the Confederation of Switzerland, the effect of the agreement dated November 8, 1916, between the Swiss firm and the firm of Briesen & Schrenk was to constitute the latter trustees of the stock of the Superheater Company, then standing in, and thereafter to be transferred into, their names, solely for the Swiss firm. Upon the foregoing findings of fact, the following is my

Opinion

The original bill of complaint in this cause was filed on December 8, 1921, by Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, against the then Treasurer of the United States, the then Director General of Railroads, the then Alien Property Custodian, and the members of the firm of Briesen & Schrenk. The bill was filed under the provisions of section 9 of the trading with the enemy act, which provides, in substance, that any person not an enemy or ally of an enemy, claiming any interest in any money or other property which may have been assigned, delivered, or paid to the Alien Property Custodian, may file with the custodian a notice of his claim under oath, and may institute a suit in equity in the Supreme Court of the District of Columbia to establish his right, so claimed, and, if so established, the court shall order the assignment or delivery to the claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or the interest therein to which the court shall determine the claimant to be entitled.

By their bill, the plaintiffs set forth that they had purchased, by a contract of November 8, 1916, certain shares of stock of the Locomotive Superheater Company, hereinafter referred to as the Superheater Company, from the Schmidt'sche Heissdampf-Gesellschaft, a German corpora-

tion, hereinafter referred to as the German corporation, which shares, after the declaration of war between the United States and Germany, had been seized by the Alien Property Custodian of the United States, as the property of the German corporation, which was determined to be an enemy, and had later been sold by the Alien Property Custodian to the Director General of Railroads, and later resold by him. By their bill of complaint, plaintiffs claimed the right to recover not only the amount of the proceeds received by the Director General of Railroads upon a resale of this stock, but also all dividends seized and also those thereafter received by the Alien Property Custodian. The Court of Appeals of this District, how-
[fol. 36] ever, in the case of Sigg-Fehr v. White, 52 App. D. C. 215, held that the plaintiffs in this cause could not recover more for the stock, as distinguished from the dividends, than the amount received by the Alien Property Custodian upon the sale thereof to the Director General of Railroads.

The real question now presented, therefore, is whether the shares of stock in question, at the time of the seizure thereof by the Alien Property Custodian, were the property of the Swiss firm, or whether said shares or any dividends paid thereon, or any right or interest in said shares or dividends, were, at the time of such seizure, owing and belonging to and held for, by, on account of, or on behalf of, or for the benefit of, the German Corporation. If these shares and dividends were solely the property of the Swiss firm, that firm is entitled to a return thereof, but if these shares or dividends, or any interest therein, belonged to the German corporation, and were within the United States at the time of the seizure, the Alien Property Custodian is entitled to retain the same, or such interest therein.

The trading with the enemy act authorized the Alien Property Custodian to seize any property in the United States owing and belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy, not holding a license granted by the President of the United States. No notice to the person or corporation claimed to be an enemy was required by the act to be given, nor did the act contemplate any opportunity to such alleged enemy

to be heard prior to the seizure of his or its property by the Alien Property Custodian. The custodian was empowered to act ex parte, whenever he determined that a certain person or corporation was an enemy, not holding a license granted by the President, and that any property of such enemy was within this country. Protection against any incorrect determination on the part of the custodian was afforded by section 9 of the act, which permitted any one not an enemy, whose property was thus seized, first to file a claim, under oath, with the Alien Property Custodian, and then to follow that claim with a suit in this court for a return of the property wrongfully seized.

It is important, at the outset, to note that the Alien Property Custodian, by a seizure, can acquire no greater right, even in the case of ownership of property by an enemy, than had the enemy whose property is seized. As was said by Justice Learned Hand, in his discussion of the act in question in the case of Kohn v. Garvan, 263 Fed. 909, "Capture neither enlarges nor contracts the rights seized."

It is now pertinent, therefore, to consider, in connection with the then existing circumstances, the provisions of the various agreements entered into by the Swiss firm under date of November 8, 1916, at which time the German corporation was the owner of certain shares of stock of the Superheater Company, which had been originally represented by certificate No. 134 of that company, for 13,490 shares. This certificate, at some time prior to October 2, 1914, was deposited by the German corporation with the London agency of the Deutsche Bank, a German corporation, with its principal place of business in Germany. The certificate was unendorsed. About October 2, 1914, when the German Empire was at war with Great Britain, this certificate, at the request of the German corporation, but without a surrender thereof, was canceled upon the books and records of the Superheater Company, and two new [fol. 37] certificates were issued in lieu thereof, one, No. 288, for 2,500 shares of the stock of the Superheater Company, to Briesen & Knauth, a copartnership in New York City, and the other, No. 289, for 10,990 shares, in the name of the German Corporation. It was a condition of the issuance of certificate No. 288 that it should be canceled in case the original certificate No. 134, for 13,490 shares, with

the assignment thereof duly executed, should be presented to the Superheater Company for transfer. In order to insure the fulfillment of this condition, these new certificates were deposited with a trust company, subject to the order of the Superheater Company. At that time, the firm of Briesen & Knauth held certificate No. 288, for 2,500 shares, solely as trustees or agents for the German corporation. On February 24, 1916, in view of the dissolution of the firm of Briesen & Knauth, through the death of Knauth, certificate No. 288 was canceled, and certificate No. 353, for 2,500 shares, was issued in lieu thereof to Briesen & Schrenk, defendants in this case, and on the same day, at the request of the German corporation, certificate No. 289, for 10,990 shares, was canceled, and, in lieu thereof, two certificates were issued, one, No. 351, for 4,250 shares, to Briesen & Schrenk, and the other, certificate No. 352, for 6,740 shares, to the German corporation. These new certificates were issued under the same conditions, and with the same protection to the Superheater Company, as certificates Nos. 288 and 289. Briesen & Schrenk had no beneficial interest in the shares represented by the certificates issued in their name, but held them solely as trustees or agents of the German corporation.

At some time prior to the date of the contracts in question; that is, the 8th day of November, 1916, the London agency of the Deutsche Bank was placed under the supervision of a controller appointed by the Board of Trade of Great Britain, and this supervision was in existence on November 8, 1916, though it does not appear that such supervision extended to the property of customers of the London agency of this bank as distinguished from the reperty and assets of the bank itself. Because of the war conditions then existing, the German Corporation, which owned the stock control of the Superheater Company, was unable to keep in touch with the affairs of that company, and there was considerable reason for supposing that the United States might enter the war on the side of the Allies. Even if the United States had not entered the war, the lack of opportunity for the German Corporation to supervise the affairs of the Superheater would have made it desirable to dispose of that interest, if it could be sold even at a sacrifice.

Under the circumstances thus existing, the German Corporation sent representatives to Switzerland to see if it might be possible to interest any Swiss capitalists in the purchase of the stock in question, or a considerable part thereof. The plaintiff, Gams, who had been connected previously with the German Corporation, on a commission basis, but not otherwise, was approached and became interested, and he in turn interested the other two original plaintiffs in going into the matter with him. The negotiations covered some two or three weeks, and the members of the Swiss firm were satisfied that the price of $200 per share at which they could purchase the stock made it a very [fol. 38] desirable purchase, providing they could secure title to the shares. The fact that certificate No. 134, for 13,490 shares, could not be surrendered, for the reasons above stated, made the Swiss firm feel that they needed some protection in this regard, and they felt that they should not be required to pay for the shares until they could receive the new shares free from any flaw in the title.

It was impossible to tell how long the war might last, or whether the United States would enter the war, but it as felt that by six months after the conclusion of peace, it would be possible to secure the outstanding certificate, for 13,490 shares, and thus remove any flaw from the title, and that by fixing such a time as the time for payment, the Swiss firm could be protected. The contracts in question were carefully drawn by one of the leaders of the Swiss bar.

The first contract, the agreement of sale, between the Swiss firm and the German Corporation, dated November 8, 1916, provided, in substance, that the German Corporation sold to the Swiss firm 12,825 shares of the stock of the Superheater Company, at two hundred per cent; that is, $200 per share, the par value being $100, with dividends from January 1, 1917, the purchase price to be payable in Swiss funds six months after the conclusion of peace between the German Empire and those States then at war with it, as well as those which might thereafter enter the World War against it. It was further provided that, because of the deferring of the time of payment, the shares of stock were not to be delivered to the purchaser at that time,

but to be transferred to an American firm, as trustee, until full payment of the purchase price, and as long as the trust lasted, the trustee was to remain as owner of the shares and to be recorded as such on the books of the Superheater Company. The Swiss firm pledged themselves not to alien or encumber the stock during the trust, and it was further provided that the trustee should see to the carrying out of this obligation. The dividends from January 1, 1917, were to be collected by the corporation, Leu & Company, in Zurich, a banking firm, and the purchasers were to receive only one per cent of these dividends, the balance to be accumulated as security for the rights of the seller. It was further expressly provided that the contract should be governed by the Swiss law, and that the place of performance for both parties was in Zurich.

Another contract, forming part of the same general transaction and dated November 8, 1916, was entered into by and between the firm of Briesen & Schrenk, defendants herein, and the Swiss firm. This agreement was signed by the Swiss firm on the date it bore and was then transmitted to Briesen & Schrenk, in New York, who signed the same on February 3, 1917. By the terms of this agreement the Swiss firm appointed Briesen & Schrenk as trustees to take possession of 12,825 shares of stock of the Superheater Company, and directed that Briesen & Schrenk should be recorded in the stock register of the corporation as owners of these shares. Briesen & Schrenk bound themselves to take part in all general meetings of the Superheater Company and to exercise their right to vote under the instructions of the Swiss firm, or, in the absence of such instructions, according to their own judgment. They further obligated themelves to pay the divi- [fol. 39] dends on this stock to a New York bank for the account of the Swiss firm and according to its instructions; and upon receipt of sufficient written notice of completion of the contract from the Swiss firm to transfer the shares of stock at any time to a person or firm designated by the Swiss firm, subject to the limitation that until the firm should produce proof of the payment in full of the purchase price for the stock to the German corporation no disposition of the stock should take place, other than to a subtrustee selected by Briesen & Schrenk.

Under the same date, November 8, 1916, and as part of this same general transaction, the Swiss firm, the German corporation, and Leu & Company, the banking corporation of Zurich entered into an agreement reciting the contract of sale by the German corporation to the Swiss firm of 12,825 shares of stock of the Superheater Company and the formation of the Swiss partnership to carry out the transaction, and it was recited that the contract of sale and the partnership agreement formed part of the agreement now under discussion. The Swiss firm obligated themselves to Leu & Company to instruct their trustees in America—that is, Briesen & Schrenk—to pay the dividends on the 12,825 shares of stock of the Superheater Company to the National City Bank of New York, for account of Leu & Company, after deduction of the compensation of the trutees. It was further provided that the agreement should not be canceled or in anywise modified except with the consent of Leu & Company. Leu & Company agreed to place one per cent of the dividends thus received to the credit of the Swiss firm, and the balance of the dividends received were to be retained by Leu & Company in an account, upon which payment was stopped, in the name of the Swiss firm and the German corporation, so as to be subject only to the joint order of the two. Leu & Company were relieved of any liability for the collection of the dividends and were to be liable only for their proper distribution, with interest to be credited thereon at the prevailing rate. It was further expressly provided that the contract should be governed by Swiss law and that the city of Zurich was chosen by the parties as the place of performance.

The rights of the three Swiss partners were fixed by an agreement of the same date; that is, November 8, 1916.

In fulfillment of the provisions of the above-mentioned contract of sale, the German corporation, under date of November 8, 1916, directed a communication to the Superheater Company, requesting the transfer, from the holdings of the German corporation, of 6,075 shares of stock to Briesen & Schrenk, in addition to the 6,750 shares already held by them, as aforesaid, with an assumption by the German corporation of responsibility to the Superheater Company in case of the surrender of the outstanding

certificate, No. 134, for 13,490 shares, properly endorsed, with legal claim thereon.

At this point it seems proper to mention that, while the contract of sale and the letter of instruction from the German corporation to the Superheater Company, for the transfer of the stock sold, provided for 12,825 shares, yet, through some mistake, due probably to the difficulties of communication and the fact that the instructions were transmitted both orally by messenger, and by the mailing, in separate mails, of two letters of instruction, only one of [fol. 40] which was received, only 12,775 shares were actually placed in the name of Briesen & Schrenk for the benefit of the Swiss firm.

As between the Swiss firm and the Superheater Company, or the German Corporation and the Superheater Company, this would perhaps affect the Superheater Company only to the extent of the 12,775 shares, yet, as between the contracting parties, the German corporation and the Swiss firm, it seems to me clear that the transaction was intended to cover 12,825 shares of the stock of the Superheater Company, and that the Swiss firm, if entitled to recover, is entitled to recover 12,825 shares of this stock or the proceeds thereof.

It is the contention of counsel for the Alien Property Custodian and the Treasurer of the United States that, while there was no actual fraud involved in this transaction, the circumstances are such as to justify the conclusion that it was not the intention of the German corporation to part absolutely with its right, title, and interest in and to the 12,825 shares of stock in question, but merely to create a situation in which it would apparently have parted with the stock, so as to put it in the name of trustees for neutrals, and so put it beyond the possibility of seizure in case the United States should enter the war against Germany; and also that it is fair to assume that the real intent of the parties was to protect the interests of the German corporation, both against the Custodian of Enemy Property of England, and also such official as might occupy a similar position for the United States, if the later should enter the war against Germany, with an opportunity, however, to the German corporation, after the conclusion of hostilities,

to take back the stock, relieving the Swiss firm of any obligation for any payment.

At first glance, it is true, circumstances look suspicious. The German corporation was unable, for the reason above stated, to secure and surrender certificate No. 134, representing the shares of which subsequent transfer was made, and this, to say the least, created a flaw in the title to the shares represented by the new certificates. Furthermore, the contract required no present payment of the Swiss firm, and in fact no payment until six months after the conclusion of peace between Germany and the countries then at war with it or which might thereafter enter the war, while, on the other hand, the Swiss firm was to receive one per cent of the dividends paid upon this stock, to cover supposed expenses of the transaction, while all remaining dividends were to accumulate in the hands of Leu & Company, until the completion of the contract of sale.

A further ground for suspicion is found by counsel for the Alien Property Custodian and the Treasurer of the United States in the testimony of the plaintiff, Sigg-Fehr, who, when asked whether, in the event that he and his partners were unsuccessful in the present suit, they would pay the Germans the purchase price of the stock, replied: "If we get the shares. If we do not get the shares, we won't pay." The examination continued:

"Q. In the event that you are unsuccesful in this suit will you pay the purchase price of the shares to the Germans?

"A. No; I say that we won't pay if we don't get the shares.

"Q. How can you avoid paying the purchase price of the shares to the Germans even if you are not successful in this suit?

"A. If we don't get the shares we won't pay.

[fol. 41] "Q. Have you an agreement with the Germans that in the event you are unsuccessful in this suit you will not pay the purchase price of the stock to the Germans?

"A. No."

Dr. Fick, the lawyer in Zurich who had prepared the original contracts and advised the Swiss firm at the time of the transaction and subsequently, gives his explanation as

to how the plaintiff, Sigg-Fehr, had gotten this impression, and, while the explanation may not be conclusive, yet, in view of the testimony of each of the other partners that they understood that they would have to pay, and expected to pay, the German corporation the agreed price for the stock in question, whether they were successful in the present suit or not, and in view also of the testimony of those expert in Swiss law that the contract of sale created an obligation which was absolute and not dependent upon a recovery in this suit, or upon the surrender of certificate No. 134 by the German corporation, it seems to me reasonable to conclude that the contract of sale in question created an obligation of the Swiss firm which was absolute and entitled the German corporation to recover from them the stipulated amounts at the time fixed by the contract, in view of the transfer of the shares in question to Briesen & Schrenk.

There is no evidence whatever that there was any agreement or understanding of any kind or nature whatever between the Swiss firm and the German corporation that the German corporation should have any right to a return of the stock in question or to anything but payment of the agreed price therefor at the time fixed by the contract; and it is too well established to require the citation of authorities that fraud is not to be inferred from mere suspicion, but must be reasonably and clearly established by the evidence. This principle has been applied by the courts in suits of the character of this one, brought under section 9 of the trading with the enemy act. See Magg v. Miller et al., 54 App. D. C. 226; Miller, Custodian, v. Herzfeld, 4 Fed. 2nd, 355; Becker v. Miller, 7 Fed. 2nd, 293.

There may have been good reason, on November 8, 1916, for the German Corporation, as well as the Swiss firm, to feel that the United States would probably enter the war against Germany; but, at that time, neither of the parties to the contract owed any obligation to the United States to maintain the status quo as to any property of the German Corporation, and, up to the moment of the declaration of war by the United States, the German Corporation and the Swiss firm had a right, if done by bona fide contract, to provide for a divestiture of the rights of the German Corporation in favor of the Swiss firm.

It seems to me apparent, from a reading of the various documents in question, that they were skillfully drawn to bring about a situation in which the German Corporation would not only be divested of its right and title to the shares but would also be no party to the agreement with Briesen & Schrenk and have no mortgage or lien on the shares of stock or the dividends accruing thereon. While such an arrrangement was probably concluded for the very purpose of placing the rights of the German Corporation beyond the reach of the authorities of this country in case the [fol. 42] United States should enter the war, yet, prior to the declaration of war, that was a thing which the parties had a right to do.

It is contended by counsel for the Alien Property Custodian and the Treasurer of the United States that the real effect of the agreement between the Swiss firm and Briesen & Schrenk was to create a mortgage or lien in behalf of the German Corporation. With this I am unable to agree. The contracts, which were prepared in Zurich, and were declared to be subject to interpretation according to the Swiss law, did not, according to the testimony of the Swiss lawyers, which is uncontradicted, create any mortgage or lien which could be enforced by the German Corporation. It is somewhat uncertain whether, under the Swiss law, injunctive relief might have been afforded the German Corporation, in case Briesen & Schrenk had attempted to violate their agreement with the Swiss firm, under which they were to continue to hold the shares of stock, as trustees for the Swiss firm, until the same were paid for. It is probable that, in an American court of law, such relief would have been afforded the German Corporation, even though it was not a party to the contract between Briesen & Schrenk and the Swiss firm. But this does not seem to me to make any material difference. The contract of sale created a debt owing from the Swiss firm to the German Corporation, to be paid at Zurich, Switzerland. Neither party to that contract was in the United States, and the debt, standing alone, was not, therefore, subject to seizure in this country, because it did not exist within this country. Even if we should assume that the effect of the contracts in question was to give the German Corporation a mortgage or lien on the stock in the hands of Briesen & Schrenk, which, however, I do not consider to be the case, yet, such

mortgage or lien was merely collateral to the debt, which did not exist in this country and was not subject to seizure here, and, according, the lien, apart from the debt which could not be seized, amounted to nothing, and could not, it seems to me, be seized, standing alone. See Carpenter v. Longan, 16 Wall. 271; Ashcroft v. Simmons, 159 Mass. 203. Furthermore, it cannot, under any reasonable construction of the contracts in question, be contended that the German Corporation was given any right to the possession of the stock, or any right to sell it, or to accelerate the maturity of the debt, or to change the place of payment from Switzerland to the United States; and yet counsel for the custodian, in endeavoring to uphold the seizure and sale of the stock by the custodian, upon the ground that the German Corporation retained a lien thereon, in effect contends for such a construction, and this, even though none of the demands of the custodian purported to seize any lien or mortgage or right of lien, but instead the shares themselves.

It may be noted here that the German corporation and also Briesen & Schrenk have filed in this cause a disclaimer of any right or interest in or to the fund here in question.

A further objection by counsel for the Alien Property Custodian and the Treasurer of the United States to the right of the Swiss firm to recover in this case is based upon the fact that certificate No. 134, for 13,490 shares of the stock of the Superheater Company, was in the London agency of the Deutsche Bank, which agency was, at the time [fol. 43] of the execution of the contracts in question, under the supervision of the controller appointed by the Board of Trade of Great Britain, pursuant to the laws of Great Britain then in effect, and that subsequently, on March 25, 1918, and while that certificate was still on deposit in said bank, an order of the Board of Trade of Great Britain was issued, under the trading with the enemy act, which stated that it vested in the Custodian of Enemy Property for England the said certificate No. 134, which certificate, on October 11, 1918, was actually delivered to the Custodian of Enemy Property for England, and was subsequently turned over by him to the Alien Property Custodian of the United States, who surrendered it to the Superheater Company for cancellation and the issuance of a new certificate to him.

It is true that the fact that this certificate was outstanding and could not be surrendered by the German corporation at the time of the execution of the contracts of November 8, 1916, created a flaw in the title of the German corporation. A flaw in the title, however, does not prevent the person who holds such title from parting with the entire title which he holds, and except as against an innocent purchaser for value of the outstanding interest which constitutes the flaw in title a release or surrender thereof will inure to the benefit of the vendee.

It must be remembered that this certificate No. 134 was never endorsed by the German corporation or even attempted to be endorsed in its name or behalf by anyone. A photostat of that certificate is in evidence in this case as it existed after its surrender to the Superheater Company by the Alien Property Custodian of the United States, and there is no contention that it ever was endorsed.

That a certificate for shares of stock is not property but mere evidence of title is too well established to require a citation of authorities, and we are not confronted here with any question as to the rights which might be acquired by a bona fide purchaser for value of a certificate of stock which had been endorsed and then lost, stolen, or seized.

In my opinion this certificate, in the London agency of the Deutsche Bank, unendorsed, did not constitute any property, or right or interest in property, in Great Britain, and accordingly there was nothing in that country for the Custodian of Enemy Property of England to seize other than the mere piece of evidence of ownership. The situation was quite different from that presented in the case of Direction der Disconto-Gesellschaft v. U. S. Steel Corporation, 267 U. S. 22, for in that case the shares seized by the English Public Trustee were "registered by tens on the Steel Corporation's books in the name of some well-known broker or the like domiciled in England, and the assignment and power of attorney to transfer the shares, printed on the back of the certificate, was signed by the broker in blank, so that the certificate passed from hand to hand." As the custodian of enemy property of England had no authority to make any gift or donation of enemy property seized by him, it seems to me fair to conclude that his surrender of this certificate to the Alien Property Custodian of the United States indicated that he did not consider that his

seizure had amounted to a seizure of any property, or right, title, or interest therein, but merely to the seizure of a piece of evidence of ownership of property which was beyond the [fol. 44] reach of the British authorities.

The certificate in question could mean nothing more in the hands of the Alien Property Custodian of the United States, except to such extent, if any, as there might have been any right, title, or interest remaining in the German corporation in and to the shares of stock in question. If the German corporation had had any such interest, and the Alien Property Custodian had seized that interest, the surrender by him of certificate No. 134 to the Superheater Company would have removed the flaw from the title to the stock or the interest therein which he had seized; but, since in my opinion no right, title, or interest in or to the stock in question remained in the German corporation, and since, accordingly, the Alien Property Custodian had acquired, by his seizure, no interest which he had a right to retain, the surrender by him of the certificate in question did not operate to change or enlarge his title or rights, but instead inured to the benefit of the Swiss firm by way of removing that outstanding flaw in their title.

In considering the legal effect upon the transaction of November 8, 1916, of the fact that the German Corporation could not then surrender certificate No. 134 to the Superheater Company for cancellation and so give the Swiss firm a perfect title, it is important to keep in mind the different parties concerned. The Superheater Company, under its by-laws, was not bound to issue new certificates without the surrender of the old, and so it took steps to protect itself; but these steps were entirely for its own protection and not for the protection of either the German Corporation or the Swiss firm, nor can these steps be considered as having prevented the German Corporation from then transferring to the Swiss firm all of the right, title, and interest which it had in and to the shares in question, so that the interest of the German Corporation was completely divested, and there remained only at most the duty on its part to surrender certificate No. 134 to the Superheater Company if and when it might be able to do so.

In so far as concerns the dividends accruing upon the stock in question, some were paid to Briesen & Schrenk, and part of these invested in Liberty loan bonds and some were

retained by the Superheater Company and by it paid over directly to the Alien Property Custodian. The money and bonds representing the dividends paid to Briesen & Shrenk were also delivered and paid over by them to the Alien Property Custodian, and dividends accruing upon the stock after the seizure were paid to the Alien Property Custodian. It seems to me that under the contract of November 8, 1916, the right to all of these dividends passed out of the German Corporation and to the Swiss firm, as completely as the stock itself, and that accordingly there was no interest therein in the German Corporation which was properly subject to seizure. The mere fact that the right of the Swiss firm to receive the dividends was to be deferred under the terms of the agreement between the Swiss firm, the German Corporation, and Leu & Company until the payment of the purchase price for the shares in question deferred the right of the Swiss firm to receive the dividends, it is true, but there was no provision by which the German Corporation was to receive the dividends in case the Swiss firm failed [fol. 45] to make the required payment. If the obligation of the Swiss firm to pay for the shares had not been absolute, so as to give the German Corporation a right to sue for and recover the purchase price, regardless of whether the Swiss firm ever received the shares or the proceeds, the situation might be different; but with the right of the German Corporation an absolute one to require payment of the purchase price, I do not see how it can be said that the right of the German Corporation in the dividends can amount to more more at most than a lien thereon to secure a debt not existing in this country but in Switzerland, nor how that lien can properly be subject to seizure apart from the existence here of the debt. Furthermore, the custodian did not make any demand purporting to constitute a seizure of any lien upon the dividends, any more than a lien upon the stock. For this reason, it seems to me that the right to all of the dividends in question passed to the Swiss firm as completely as the right to the shares of stock, as against any vestige of right in the German corporation.

The evidence does not make it entirely clear just what dividends are now held by the Alien Property Custodian or the Treasurer of the United States as having accrued upon the 12,825 shares of stock in question and been seized by the Alien Property Custodian; and the appropriate pro-

ceeding would, therefore, be to retain this cause for an accounting by the Alien Property Custodian and the Treasurer of the United States as to all such dividends.

As for the stock itself, it appears that the Alien Property Custodian sold these shares to the Director General of Railroads of the United States at $200 per share, a total of $2,565,000. The Court of Appeals, on the appeal previously taken in this case, and as before stated, decided that there could be no recovery herein of any excess over that amount received by the Director General of Railroads upon a resale of the stock by h'm at an increased price, so that the recovery here, in so far as concerns the stock, as distinguished from the dividends, is limited to the proceeds of sale received by the Alien Property Custodian, that is, $2,565,000.

At the time of the hearing, it appeared that Briesen & Schrenk, by a separate suit in this court, had obtained a decree, establishing a lien upon the fund in question for the amount of the commissions to which they were entitled for having held the same as trustees, though, at that time, payment had apparently not been made. The right of the plaintiffs herein are, of course, subject to such amounts as may have been paid from the fund in question, under that decree, and that matter also can be determined in connection with an accounting of the dividends here involved.

By their bill of complaint, the plaintiffs also claim interest on the funds in the hands of the Alien Property Custodian. Their right to such interest is clearly established by the case of Henkels v. Sutherland et al., 271 U. S. 298, and the accounting herein should also include a determination of interest in accordance with the method laid down in that case.

I have endeavored to confine my findings of fact to matters of fact, in so far as seemed feasible, and to eliminate therefrom conclusions of law.

It would, of course, be possible to hand down numerous separate and minor conclusions of law upon which to base [fol. 46] the principal conclusion, but it seems to me unnecessary to do this, and I deem it sufficient, as a conclusion of law, based upon the findings of fact, to conclude that the plaintiffs are entitled to recover from the Alien Property Custodian and the Treasurer of the United States

the proceeds of sale of 12,825 shares of stock of the Superheater Company, at $200 per share, the dividends thereon, and the investments or reinvestments of any thereof in the hands of the Alien Property Custodian, with interest thereon, less such sum or sums as may properly have been paid or be payable by him therefrom, and less the expenses of this proceeding, after an accounting to be had of such dividends and also of interest according to the method provided by the Supreme Court in the Henkels case (supra).

I am returning herewith the court files referred to me, and am also filing the report of the hearings held by me and the exhibits then offered. At these hearings, and in the briefs subsequently filed, the case was ably presented by counsel on each side.

Respectfully submitted,

Stanton C. Peelle, Special Master.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

OPINION, BAILEY, J.—Filed Dec. 10, 1927

In view of the nature of the order of reference in this case, I think that the findings of fact of the master should not be disturbed, if there was any substantial evidence before him to warrant his conclusions, even though I were to deem them erroneous. There is ample evidence to sustain his findings of fact, and they are therefore confirmed.

I also agree with the result which the master reached on the questions of law involved. The agreement between the German corporation and the Swiss firm operated to vest the title to the stock in question in the Swiss firm, according to the law of Switzerland when the agreement was made. As between the parties, this law determined their rights in the stock regardless of whom the latter might be, subject to the rights of third parties in the locus of the situs of the stock. The Alien Property Custodian, by his seizure, acquired no greater rights than those of the German corporation, and as the master has found as a fact that the German corporation, under the law of Switzerland,

retained no interest, legal or equitable, in the stock, there was no interest that could be seized by the custodian.

The plaintiff therefore is entitled to the relief sought.

December 10, 1927.

Jennings Bailey, Justice.

In Supreme Court of District of Columbia

Decree—Filed Jan. 19, 1928

* * * * * * *

This cause came on to be heard at this term and thereupon, upon consideration thereof, it is this 19th day of January, 1928.

[fol. 47] Adjudged, ordered, and decreed as follows, viz:

1. That the report of Stanton C. Peelle, Esq., special master, filed in this court in this cause be and it is in all things approved, ratified, and confirmed; and

2. That the exceptions to the report of the special master filed by the defendants, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, be and the same are hereby overruled; and

3. That Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, the original three complainants herein, were the owners of certain money and other property heretofore seized by the Alien Property Custodian under the provisions of the act of Congress known as the trading with the enemy act, and which property or the proceeds therefrom is now held by the Alien Property Custodian or the Treasurer of the United States and which is described as follows, to wit: 12,825 shares of the capital stock of Locomotive Superheater Company, a Delaware corporation, together with United States Liberty loan bonds, second issue, of the par value of $439,000.00, and United States Liberty loan bonds, third issue, of the par value of $50,000.00, together with certain sums of cash representing dividends upon said

shares of stock declared subsequent to January 1, 1917, and paid over to the Alien Property Custodian by Briesen & Schrenk, of New York City, and by said Locomotive Superheater Company; and

4. That the present complainants herein, Henry Escher, ancillary administrator in the District of Columbia of the estate of Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, are now entitled to the release and return and repayment of the said money and other property and/or the proceeds therefrom, together with the income therefrom and the accretions thereto; and

It is further adjudged, ordered, and decreed that for and in full payment of his services and expenses as special master in this cause, the defendants, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, shall pay out of the moneys and properties held by them and described above in paragraph numbered 3, the sum of ten thousand dollars.

It is further adjudged, ordered, and decreed that the defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, pay, convey, transfer, assign, and deliver to said complainants the said money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the trading with the enemy act and amendments thereto; and also deducting therefrom the said sum of $10,000.00 to be paid to the special master in accordance with this decree.

Jennings Bailey, Justice of Supreme Court of the District of Columbia.

[fol. 48] I consent as to form.

Dean Hill Stanley, Special Assistant to the Attorney General, Solicitor for Defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

WARRANT FOR SATISFACTION OF DECREE—Filed May 3, 1928

* * * * * * *

To the Clerk of the Supreme Court of the District of Columbia:

Whereas, Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmunds Gams, plaintiffs in the above-entitled cause, did on the nineteenth day of January, 1928, obtain a decree in the Supreme Court of the District of Columbia against Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, adjudging, ordering, and decreeing that Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, the original three complainants herein, were the owners of certain money and other property heretofore seized by the Alien Property Custodian under the provisions of the act of Congress known as the trading with the enemy act, and which property, of the proceeds of the sale therefrom, is now held by the Alien property Custodian or the Treasurer of the United States, and which is described as follows, to wit: 12,825 shares of the capital stock of Locomotive Superheater Company, a Delaware corporation, together with United *United* States Liberty bonds, second issue, of the par value of $439,000.00, and United States Liberty loan bonds, third issue, of the par value of $50,000.00, together with certain sums of cash representing dividends upon said shares of stock declared subsequent to January 1, 1917, and paid over to the Alien Property Custodian by Briesen & Schrenk, of New York City, and by said Locomotive Superheater Company, and further adjudging, ordering, and decreeing that the complainants herein, Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, are now entitled to the release, return, and repayment of said money and other property, and/or the proceeds therefrom, together with the income therefrom and the accretions thereto, and further adjudging, ordering, and decreeing that the defendants, Howard Sutherland, as Alien Property Cus-

todian, and Frank White, as Treasurer of the United States, pay, convey, transfer, assign, and deliver to said complaints the said money and other property, or, in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and dividends and accretions thereto, after taking therefrom any expenses and disbursements in respect to or on account of said property duly made under the authority of the trading with the enemy act and amendments thereto.

[fol. 49] And whereas the plaintiffs herein have received satisfaction for the same, with the exceptions hereinafter noted, these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of said decree, and for your so doing this shall be your sufficient warrant and discharge in that behalf; provided, however, that nothing herein contained shall operate as a waiver or release of any rights or claims which the undersigned may have to or in respect of the following:

(1) The sum of $55,909.83 deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for the plaintiffs herein as an alleged administrative expense.

(2) The sums of $702,016.41 and $16,444.37 paid by the Alien Property Custodian and/or the Treasurer of the United States on March 15, 1924, and May 12, 1927, respectively, as alleged income taxes to the Commissioner of Internal Revenue.

(3) Whatever rights or claims the plaintiffs may have growing out of the purchase, holding, and/or sale by the Director General of Railroads to the stock of the Locomotive Superheater Company decreed in this suit to have been the property of the plaintiffs.

(4) The sums of $905.86 and $106.30 deducted from cash received by the Alien Property Custodian as a collection charge.

(5) The plaintiffs' proportionate share of the earnings upon the funds paid into the Treasury of the United States by the Alien Property Custodian, and with which plaintiffs' money was commingled.

By accepting this warrant for satisfaction of decree with the reservations herein contained it is understood that the Alien Property Custodian and the Treasurer of the United States and the Director General of Railroads do not concede the validity of any of said reserved claims or waive any defenses whatsoever against the same.

In witness whereof I, as solicitor of record of the said plaintiffs, have hereunto set my hand and affixed my seal this 23 day of February, 1928.

Lyttleton Fox.

Attest: Robert L. Graham, Jr.

County of New York,
State of New York, ss:

Be it remembered that on this 23 day of February, 1928, before me, the subscriber, a notary public of the County and State of New York, personally appeared Lyttleton Fox, who, I am satisfied, is the person named in and executing the foregoing indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein set forth.

Robert L. Graham, Jr., Notary Public, New York County, &c. My commission expires March 30, 1929. (Notarial Seal.)

In Supreme Court of District of Columbia

Petition for Rule to Show Cause—Filed Mar. 23, 1928

[fol. 50] The petition of Henry Escher, ancillary administractor of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast and Edmund Gams, plaintiffs in the above-entitled cause respectfully show under this honorable court as follows:

1. That heretofore on the 19th day of January, 1928, a decree was entered in the cause adjudging that certain money and other property seized by the Alien Property Custodian upon a determination that it belonged to an

enemy within the purview of the trading with the enemy act, in fact belonged to and was the property of the original plaintiffs in this action, Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams and further ordering and directing the defendants, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, to "pay, convey, transfer, assign, and deliver to said complainants the said money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the trading with the enemy act and amendment thereto; and also deducting therefrom the said sum of $10,000.00 to be paid to the special master in accordance with this decree."

2. That the time within which an appeal could be noted with respect to such decree has expired and no such appeal has been noted.

3. That subsequent to the entry of this decree and pursuant thereto the defendant, the Alien Property Custodian, has furnished to plaintiffs a statement purporting to show the money and other property belonging to the original plaintiffs in this action which was seized by the custodian together with the proceeds from the sale of a portion of said property, the shares of stock of the Locomotive Superheater Company, and the additions and accretions thereto and income therefrom and also deductions therefrom asserted to be authorized under the authority of the trading with the enemy act and the amendments thereto, in addition to the sum of $10,000.00 specifically mentioned in the decree. A copy of this statement is annexed hereto, marked "Exhibit A," and made a part hereof.

4. That in partial performance of the decree defendants have transferred and delivered over to a depository designated by the plaintiffs, the United States Treasury, notes in the amount of $439,000.00 and the United States Liberty Loan bonds in the amount of $50,000.00 shown upon said

statement and have paid the amount of $2,250,581.51 in partial performance of said decree. A release or receipt expressly asserting and reserving the right and claim to receive further payments was executed and delivered; and copy thereof marked "Exhibit B" is attached hereto and made a part hereof.

5. That plaintiffs are entitled to receive in addition to the items appearing upon the statement noted above, a large amount approximating the sum of $1,000,000.00 or more as their proportionate share of the earnings upon [fol. 51] funds belonging to them and covered into the Treasury of the United States by the Alien Property Custodian. On the 17th day of March, 1928, a check or voucher in the amount of $459,938.66 and being a partial payment of such earnings was delivered by the defendant, Alien Property Custodian, to the depositary designated by the plaintiffs and was accepted as payment of that amount upon the claim of plaintiffs, and another check in the amount of approximately $490,000.00, so plaintiffs are informed, and believe has been drawn by the defendant, the Treasurer of the United States, for the purpoe of making an additional payment to plaintiffs upon their claim for such earning upon their funds covered into the Treasury of the United States, but delivery of such check has been wrongfully withheld and refused contrary to and in violation to the express terms of the decree above mentioned, and in spite of the fact that the said defendant, the Treasurer of the United States, admits that at least this amount in addition to the sum above mentioned which was paid by the defendant, Alien Property Custodian, has been earned or accrued upon the funds belonging to the plaintiffs covered into the Treasury of the United States by the Alien Property Custodian.

6. That the defendant, the Alien Property Custodian, has asserted and claimed and still asserts and claims the right to deduct and withhold from money belonging to plaintiffs certain sums for collection charges and alleged adminitrative expense and has deducted from the money belonging to plaintiffs, and is withholding and refusing to pay over to plaintiffs the following sums, to wit:

Collection fee upon moneys collected by the Alien Property Custodian	$905.86
Collection fee upon moneys collected by the Alien Property Custodian	106.30
Administration expense	55,909.83

In addition the defendant, Alien Property Custodian, claims the right to make further deductions from the money belonging to plaintiffs on account of administrative expense and similar charges. These deductions are unauthorized by any valid provisions of the trading with the enemy act and the amendments thereto and are in violation of and contrary to the provisions of the decree above mentioned and amount to taking of the property of plaintiffs without any authority of law.

7. That the defendant, the Alien Property Cutodian, as will appear from the statement, "Exhibit A," claims to have paid over to the Commissioner of Internal Revenue out of the money belonging to the plaintiffs and then held by the Treasurer of the United States the sum of $702,016.41 on March 15, 1924, and the sum of $16,444.37 on May 12, 1927. At the time these payments were made this suit was pending and such payments, if made, were directly contrary to and not authorized by the provisions of the trading with the enemy act and the withholding or deducting of such sums from the money belonging to plaintiffs is in violation of and contrary to the directions and requirements of the decree above mentioned and said sums have been unlawfully and wrongfully deducted or attempted to be deducted from the money belonging to the plaintiffs, and have been and still are unlawfully and wrongfully withheld from the plaintiffs.

8. That notwithstanding the demand made therefor, the defendants, Frank White, as Treasurer of the United [fol. 52] States, and Howard Sutherland, as Alien Property Custodian, have failed, neglected, and refused fully to comply with and carry out the terms of the decree above mentioned and are unlawfully and wrongfully and in volation of the provisions of said decree, withholding the sums of money above mentioned and other sums the exact amount of which is unknown to plaintiffs.

Wherefore, in consideration of the premises plaintiffs respectfully pray:

1. That a rule issue out of this court directed to the defendants, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, requiring them to appear on a day to be fixed in said rule, then and there to show cause, if any they have, why they should not forthwith pay over to plaintiffs the sums specifically mentioned which have been deducted or are being withheld from plaintiffs as above stated, and why they should not forthwith compute in full amount of plaintiffs' proportionate share of the earnings upon funds covered into the Treasury of the United States by the Alien Property Custodian, and forthwith pay same over to plaintiffs and why they should not forthwith and without further excuse comply in full with the requirements and directions of the decree dated January 19, 1928.

2. And that plaintiffs be awarded such other and further relief as in the premises they may be entitled to.

Spier Whitaker, Lyttleton Fox, Lawrence A. Baker,
Attorneys for Plaintiffs.

Duly sworn to by Henry Escher. Jurat omitted in printing.

EXHIBIT A TO PETITION

Alien Property Custodian

Date: 2/9/28.

Claim No. 6101. Trust No. 2975.

Trust in name of Schmidtsche Heissdampf Gesellschaft. Address:——. Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, dec'd.

[fol. 53] Claimant: Gottfried Rudolph Baumann-Kienast & Edmund Gams. Address: ——.

Claimed: Cash assets $2,306,491.34. Other assets: ——.

Securities: U. S. L. L. bonds and U. S. Treasury notes.

Statement of Property Held in Trust

Report Nos. (a) 5723; (b) 8381; (c) 8523; (d) 26187; (e) 30280/1.
Reporters: All by Locomotive Superheater Co. excepting 8381, which is by Knauth, Nachod & Kuhne.

Assets held	Appraised value	Income	Net cash
$439,000.00 United States Treasury notes 3½%, series A 1930/2.			
$50,000.00 United States Liberty loan bonds, 3rd Issue, due 1928, 4¼%, U. S. Treasury.			
NOTE.—The above described Treasury notes rec'd, in exchange for the same amount of U. S. Liberty loan bonds, 2nd issue.			
Proceeds sale of 12,858 shrs. Locomotive Superheater Co. stock @ 200 per shr. plus int.....	.....	.....	$2,716,498.28
Dividends on 50 shrs. Locomotive Superheater Co. stock (out of group 750 shrs.):			
4/1/17 to 7/1/19.....	.....	$2,000.00	
Less tax.....	$10.00		
Depository commission.....	50.52		
		60.52	
		1,939.48	
Dividends on 12,775 shrs. Locomotive Superheater Co. stock:			
7/3/18 and 7/20/18.....	.....	127,750.00	
10/29/18	.....	63,875.00	
2/17/19	.....	63,875.00	
Credit balance (report 30281).	.....	36,830.39	
			294,269.87
Interest on $439,000 U. S. L. L. bonds, 2nd:			
@ 4% 11/15/18 to 11/15/23 11 @ 8,780.....	.....	96,580.00	
@ 4¼% 5/15/24 to 5/15/27 7 @ 9,328.75	.....	65,301.25	
Exchanged for Treasury notes @ 3½%, 9/15/27.....	.....	7,682.50	
		169,563.75	
Less A. P. C. collection fee.....	.....	905.86	
			168,657.89
Interest on $50,000 U. S. L. bonds, 3rd, 4¼% 3/15/19 to 9/15/27, 18 @1,062.50.....	.....	19,125.00	
Less A. P. C. collection fee.....	.....	106.30	
			19,018.70
			3,198,444.74
Less disbursements from Treasury:			
2/11/20 Ford, Bacon & Davis appraising Loco. Sup. Heater Co. stock.....	2,842.29		
6/26/23 Hart, Dice & Carlson reporting, etc., Von Briesen suit	271.50		

Assets held	Appraised value	Income	Net cash
2/18/25 Adna R. Johnson, jr. Att. fee	10,000.00		
1/7/26 D. H. Stanley (D. of J.) out of pocket expenses	19.27		
1/22/26 stenographic services	19.20		
2/15/26 telephone charges	4.75		
3/15/26 " "	8.80		
3/3/26 D. H. Stanley (D. of J.) out of pocket expenses	28.42		
3/30/26 telegraphic charges	27.67		
4/21/26 claim 7585 court decree Van Briesen et al	150,000.00		
4/20/26 copy of transcript of record	151.80		
6/10/26 Public Printer	115.42		
8/22/26 telephone charges	3.50		
	163,492.62		
3/15/24 income tax 1918/22 to be adjusted	702,016.41		
5/12/27 income tax 1924 to be adjusted	16,444.37		
			881,953.40
			2,316,491.34
Retained to pay special master as per court decree			10,000.00
			2,306,491.34

Subject to administration expense and
" " expenses incidental to release
" " additional charges of Dept. Justice, if any.
Drury/ems.

[fol. 54] EXHIBIT B TO PETITION

Receipt of Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gabs for Payment Received Pursuant to a final Decree of the Supreme Court of the District of Columbia, Entered January 19, 1928.

Whereas, pursuant to the provisions of section 9 of the act of Congress known as the "trading with the enemy act," as amended, Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams have heretofore brought suit in the Supreme Court of the District of Columbia against Frank White, individually and as Treas-

urer of the United States of America, James C. Davis, individually and as Director General of Railroads, Thomas W. Miller, as Alien Property Custodian, and Arthur von Briesen, Fritz von Briesen, Hans von Briesen, and Otto von Schrenk, copartners in the practice of law under the name of Briesen and Schrenk, to establish their claim to certain moneys and other property held by the Treasurer of the United States, taken by the Alien Property Custodian as the property of Schmidt'sche Heissdampf Gesellschaft; and

Whereas, the Supreme Court of the District of Columbia has entered a decree in said suit on January 19, 1928, ordering "* * * that the defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, pay, convey, transfer, assign, and deliver to said complainants the said money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the trading with the enemy act and amendments thereto; and also deducting therefrom the said sum of $10,000.00 to be paid to the special master in accordance with this decree."

Now, therefore, in consideration of the premises, the undersigned, Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, the complainants in said suit, do hereby acknowledge receipt from the Treasurer of the United States, with the exceptions hereinafter noted, of the money ordered by said decree to be paid by the Treasurer of the United States, as follows, to wit:

Cash in the amount of $2,250,581.51 (two million two hundred fifty thousand five hundred eighty-one and 51/100 dollars), with the exceptions hereinafter noted, paid pursuant to said decree.

And the undersigned does hereby further acknowledge and accept such sum as a compliance with and satisfaction of said decree above quoted.

In consideration of the premises, the undersigned hereby release and forever discharge the President of the United States, the Treasurer of the United States, Frank White,

individually and as Treasurer of the United States, Guy F. Allen, individually and as acting and Assistant Treasurer [fol. 55] of the United States, John Burke, individually and as Treasurer of the United States, Howard Sutherland, individually and as Alien Property Custodian, Frederick C. Hicks, individually and as Alien Property Custodian, Thomas W. Miller, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, A. Mitchell Palmer, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims, and demands of every kind, character, and description, whether joint or several, which the undersigned may have in respect to the matters in question, based upon or arising out of said suit or said decree in said suit: Provided, however, that nothing herein contained shall operate as a waiver or release of any rights or claims which the undersigned may have to or in respect of the following:

(1) The sum of $55,909.83 deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for the plaintiffs herein, as alleged administrative expense.

(2) The sums of $702,016.14 and $16,444.37 paid by the Alien Property Custodian and/or the Treasurer of the United States on March 15, 1924, and May 12, 1927, respectively, as alleged income taxes to the Commissioner of Internal Revenue.

(3) Whatever rights or claims the plantiffs may have growing out of the purchase, holding and/or sale by the Director General of Railroads of the stock of the Locomotive Superheater Company decreed in this suit to have been the property of the plaintiffs.

(4) The sums of $905.86 and $106.30 deducted from cash received by the Alien Property Custodian as a collection charge.

(5) The plaintiff's proportionate share of the earnings upon funds paid into the Treasury of the United States by the Alien Property Custodian, and with which plaintiff's money was commingled.

By accepting this receipt with the reservations herein contained it is understood that the Alien Property Custodian, the Treasurer of the United States, and the Director General of Railroads, do not concede the validity of any of said reserved claims or waive any defenses whatsoever against the same.

Witness the signatures of the undersigned at New York City, on the 23rd day of February, 1928.

Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, deceased. Lyttleton Fox, Attorney in Fact. Henry Escher, Attorney in Fact. American Trust Company, Cyrio Burdett, Vice President, Attorney in Fact.

Attest: W. M. Naughton, asst. Secretary. Robert L. Graham, Jr. (for all signatures), ss.

On this 23rd day of February, in the year 1928, before me personally came Henry Escher, at attorney in fact, individually, and as ancillary administrator of Jak. Robert [fol. 56] Sigg-Fehr, deceased, and Lyttleton Fox, as attorney in fact to me known, and known to me to be the persons described in and who executed the foregoing instrument, who being by me duly sworn, depose and say that said instrument is their voluntary act and deed.

Robert L. Graham, Jr., Notary Public, New York County. New York County Clerk's No. 203; New York County Register's No. 9167; King County's Clerk No. 16; King County Register's No. 9122. Commission expires March 30, 1929. (Seal.)

State of New York,
County of New York, ss:

On the 23rd day of February, 1928, before me personally came Cyrio Burdett, to me known, who being by me duly sworn, did depose and say that he resides in Scarsdale, New York, that he is a vice president of the American Trust Company, the corporation described in and which executed the above instrument, that he knows the seal of said corporation, that the seal affixed to such instrument is said corporate seal, that it was so affixed by order of the board

of directors of said corporation, and that he signed his name thereto by like order.

Robert L. Graham, Jr., Notary Public, New York County. New York County Clerk's No. 203; New York County Register's No. 9167; King County's Clerk No. 16; King County Register's No. 9122. Commission expires March 30, 1929. (Seal.)

IN SUPREME COURT OF DISTRICT OF COLUMBIA

RULE TO SHOW CAUSE—Filed Mar. 23, 1928

Upon consideration of the petition of Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, plaintiffs, filed herein on the 23d day of March, 1928, it is by the court this 23d day of March, 1928,

Ordered that Frank White, as Treasurer of the United States, Howard Sutherland, as Alien Property Custodian of the United States, defendants, appear before this court on Friday, the 30th day of March, 1928, at ten o'clock a. m., or as soon thereafter as counsel can be heard, and show cause, if any they have, why they should not forthwith compute in full the amount to plaintiffs' proportionate share of the earnings upon the funds covered into the Treasury of the United States by the Alien Property Custodian and pay the same over to the plaintiffs, and why they should not forthwith pay over to the plaintiffs the sums deducted or withheld from them and constituting alleged collection charges and administration expenses in the sum of, to wit: $56,921.99, and moneys paid over by the Alien Property Custodian to the Commissioner of Internal Revenue in the sum of, to wit: $718,460.78, as fully described and set forth [fol. 57] in said petition, and why they should not forthwith and without further excuse comply in full with the requirements and directions of the decree entered herein by this court on the 19th day of January, 1928; and it is further

Ordered that a copy of the said petition and of this order be served upon said Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property

Custodian of the United States, defendants, on or before the 26th day of March, 1928.

Jennings Bailey, Justice.

Marshal's Return

Served a copy of the within rule on Frank White and Howard Sutherland each personally March 24, 1928.

Edgar C. Snyder, U. S. Marshal in and for the Dist. of Columbia, by Wm. J. Kirkland, Deputy U. S. Marshal.

In Supreme Court of District of Columbia

Return to and Motion to Discharge Rule to Show Cause and Answer to Petition—Filed Mar. 29, 1928

Motion to Discharge Rule to Show Cause

Now come the respondents, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, and separately and severally move that the rule to show cause issued herein on the 23rd day of March, 1928, and directed to them, be discharged, and as grounds for their said motion assign the following:

1. It appears affirmatively from the allegations of the petition that the Alien Property Custodian has complied with the final decree entered herein on the 19th day of January, 1928.

Answer to Petition

A. And now not waiving the many defects and insufficiencies of the petition filed herein these defendants as their answer to the petition filed herein and to the rule to show cause issued thereon separately and severally, say:

1. They admit the allegations of paragraph numbered 1 of the petition.

2. They admit the allegations of paragraph numbered 2 of the petition.

3. They admit the allegations of paragraph numbered 3 of the petition.

4. They admit the allegations of paragraph numbered 4 of the petition.

5. They deny the allegations of paragraph numbered 5 of the petition except that they admit that on the 17th day of March, 1928, a check on the Treasurer of the United States in the sum of $459,938.66 was delivered to the plaintiffs as payment of a proportionate allocation of earnings [fol. 58] upon funds in the Treasury of the United States with which the money of the plaintiffs had been com-ingled and invested by the Secretary of the Treasury. Said $459,-938.66 represented allocation of such income on plaintiffs' property from March 4, 1923, to September 15, 1927, and allocation of income upon income from March 4, 1923, to September 15, 1927.

Further answering said paragraph these respondents say that the Treasury Department has determined that the proportionate allocation of income upon plaintiffs' property from the date of seizure to March 4, 1923, is $494,153.95, but these respondents deny that a check has been drawn for said amount. Pursuant to the provisions of section 18 of the settlement of war claims act of 1928 said amount of $494,153.97 has not been paid to the plaintiffs pending determination of income and estate taxes due to the United States.

6. Answering the allegations of paragraph numbered six of the petition these respondents say that the sum of $905.86 and $106.30 mentioned therein were paid by the Alien Property Custodian as fees to third persons for collecting moneys of the plaintiffs collected by the Alien Property Custodian, and the custodian or the Treasurer of the United States is no longer in possession of said sums of money. Said sums are properly deductible from the amount due the plaintiffs under the terms of the provisions of the final decree entered herein.

Further answering said paragraph these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred

in administering money and other property seized by the Alien Property Custodian, are paid.

7. Answering the allegations of paragraph numbered 7 of the petition, these defendants admit that the Alien Property Custodian, on March 15, 1924, paid to the collector of internal revenue the sum of $702,016.41, and on May 12, 1927, the sum of $16,444.37, as income taxes upon income derived from the property held by the Alien Property Custodian and belonging to the plaintiffs herein. These defendants say that said sums have been paid into the Treasury of the United States and have become a part of the general funds of the United States and are out of control of either of these defendants.

Further answering the said paragraph of the petition, these defendants say that claims for refund of the said taxes were filed with the Commissioner of Internal Revenue on March 6, 1928, and that said claims are now pending, awaiting proper action in the Bureau of Internal Revenue.

8. They deny the allegations of paragraph numbered 8 of the petition.

Wherefore these defendants having fully answered the petition and rule to show cause issued thereon, pray that the rule to show cause be discharged and the petition dismissed.

Howard Sutherland, Alien Property Custodian.
Frank White, Treasurer of the United States.

[fol. 59] *Duly sworn to by Howard Sutherland and Frank White. Jurat omitted in printing.*

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION BY PLAINTIFFS UPON RETURN OF RULE TO SHOW CAUSE—Filed Mar. 30, 1928

* * * * * * *

Now come the plaintiffs in this cause hereinabove named and upon their petition for a rule to show cause filed on the 23rd day of March, 1928, and upon the rule to show cause issued thereon dated the 23rd day of March, 1928, and upon

the answer to said petition and rule filed by the defendants, Frank White, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian, on the 30th day of March, 1928, and upon the decree entered in this cause upon the 19th day of January, 1928, and upon all the proceedings in this cause and the whole of the record in this cause, move as follows:

1. That the said answer to the petition and rule filed by the said defendants be stricken from the record of this cause upon the ground that said answer is insufficient in law and sets forth no facts sufficient to justify, explain, or excuse the admitted refusal to deliver and pay over to plaintiffs money in the hands of said defendants admittedly belonging to plaintiffs; nor does it set forth any facts sufficient to explain, justify, or excuse the willful delay and refusal in complying fully with the terms of the decree entered herein.

2. That an order be entered herein requiring, directing, and commanding said defendants forthwith to deliver and pay over to plaintiffs the sum of $494,153.95 admitted by paragraph five of said answer to be due and owing to plaintiffs as a portion of the income or other earnings upon [fol. 60] money of plaintiffs covered into the Treasury of the United States; and the sum of $55,909.83 admitted by paragraph six to have been deducted from the moneys belonging to the plaintiffs under the guise of administrative expenses; and the sums of $905.86 and $106.30 alleged to have been paid as collection charges for collecting money belonging to plaintiffs; and the sums of $702,016.41 and $16,444.37 alleged to have been paid to the collector of internal revenue, together with the further and additional sums of income or earnings upon the moneys belonging to plaintiffs and covered into the Treasury of the United States; and further requiring and directing defendants forthwith to compute the full amount of money owing and payable by defendants to plaintiffs and to render to plaintiffs the statement thereof and immediately to pay the same over to plaintiffs; and requiring and directing said defendants otherwise fully to comply with the said decree of January 19, 1928.

Spier Whitaker, by Lyttleton Fox, Lawrence A. Baker, Solicitors for Plaintiffs.

In Supreme Court of District of Columbia

Decree—Filed Apr. 2, 1928

Upon consideration of the petition of the plaintiffs for a rule to show cause filed herein on the 23rd day of March, 1928, the rule issued on said petition on the 23rd day of March, 1928, the return to and motion to discharge rule and answer of the defendants to the said petition filed herein on the 30th day of March, 1928, and the court being fully advised in the premises it is by the court this 2nd day of April, 1928—

Adjudged, ordered, and decreed that the deduction of and retention by the defendants of the sum of $55,909.83 as administration expense from the property and moneys due the plaintiffs under the terms and provisions of the decree entered herein on January 19, 1928, is unlawful and without right; and it is further

Ordered that the defendants pay over to the plaintiffs forthwith the said sum of $55,909.83; and it is further

Ordered that further action on the said rule to show cause be held in abeyance for a reasonable time and until further application is made by the plaintiffs to the court with respect thereto.

Jennings Bailey, Justice.

Consent is given as to form.

Dean Hill Stanley, Attorney for the Defendants Frank White and Howard Sutherland.

[fol. 61] In Supreme Court of District of Columbia

Notice of Appeal—Filed Apr. 19, 1928

To the Supreme Court of the District of Columbia:

Now come the defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their attorney, and note an appeal from the decree entered in the above-entitled case on April 2, 1928, to the Court of Appeals of the District of Columbia,

and respectfully request that the clerk be directed to issue proper citations to the plaintiffs herein.

Thomas E. Rhodes, Special Assistant to the Attorney General, Attorney for Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, defendants.

Citation, in usual form, showing service on Lawrence Q. Baker, omitted in printing.

[fol. 62] In Supreme Court of District of Columbia

Assignment of Errors—Filed May 3, 1928

Now come the defendants, Howard Sutherland, as Alien Property Custodian, and H. T. Tate, as Acting Treasurer of the United States, assigning errors in the final decree of the court entered on April 2, 1928, in the above-entitled case, and respectfully show that the court erred as follows:

(1) That the court erred in adjudging, ordering, and decreeing that the deduction of and retention by the defendants of the sum of $55,909.83, as administrative expense from the property and money due the plaintiffs under the terms and provisions of the decree entered herein on January 19, 1928, is unlawful and without right.

(2) That the court erred in not adjudging, ordering, and decreeing that the Alien Property Custodian was entitled to deduct and retain the sum of $55,909.83 as administrative expense from the property and money of the plaintiffs held by said custodian and Treasurer of the United States.

(3) That the court erred in holding, adjudging, and decreeing that the aforesaid sum of $55,909.83 was a part of the property and money due the plaintiffs under the terms and provisions of the decree entered herein on January 19, 1928.

(4) That the court erred in not adjudging, ordering, and decreeing that the aforesaid sum of $55,909.83 was not a

part of the property and money due the plaintiffs under the terms and provisions of the aforesaid decree entered herein on January 19, 1928.

(5) That the court erred in not adjudging, ordering, and decreeing that the rule to show cause be discharged and the petition dismissed.

Thomas E. Rhodes, Special Assistant to the Attorney General, Attorney for Howard Sutherland, Alien Property Custodian, and H. T. Tate, Acting Treasurer of the United States.

Service of a copy of the above assignment of errors acknowledged this 3d day of May, 1928.

Lawrence A. Baker, Attorney for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed May 3, 1928

* * * * * * *

The clerk will please prepare the record on appeal in the above entitled case, and include therein the following papers and proceedings:

(1) Bill of complaint (without exhibits).
(2) Motion to dismiss and answer.
(3) Report of special master.
(4) Opinion of the court dated December 10, 1927.
(5) Final decree entered on January 19, 1928.
(6) Warrant for satisfaction of decree.
[fols. 63 & 64] (7) Petition for rule to show cause and exhibits thereto.
(8) Rule to show cause.
(9) Return to and motion to discharge rule to show cause and answer to petition.
(10) Motion by plaintiffs upon return of rule to show cause.
(11) Decree entered on April 2, 1928.
(12) Notice of appeal.
(13) Citation.
(14) Assignment of errors of the defendants.
(15) This designation of record.

Thomas E. Rhodes, Special Assistant to the Attorney General, Attorney for Defendants.

Service of copy of above designation of record acknowledged this 3d day of May, 1928.

Lawrence A. Baker, Attorney for Plaintiffs.

Clerk's certificate to foregoing transcript omitted in printing.

Monday, May 6th, A. D. 1929.

* * * * * * *

No. 4777

H. T. TATE, as Treasurer of the United States, et al., Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak Robert Sigg-Fehr, Deceased, et al.

The argument in the above entitled cause was commenced by Mr. Thomas E. Rhodes, attorney for the Appellants.

Tuesday, May 7th, A. D. 1929.

* * * * * * *

No. 4777

H. T. TATE, as Treasurer of the United States, et al., Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak Robert Sigg-Fehr, Deceased, et al.

The argument in the above entitled cause was continued by Mr. Thomas E. Rhodes, attorney for the appellants and by Mr. Spier Whitaker, attorney for the appellees and was concluded by Mr. Thomas E. Rhodes, attorney for the appellant. On motion, both sides are allowed to file additional typewritten briefs herein if so advised.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4777

H. T. TATE, as Treasurer of the United States; Howard Sutherland, as Alien Property Custodian, and Others, Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gams

Appeal from the Supreme Court of the District of Columbia

Before Martin, Chief Justice; Robb and Van Orsdel, Associate Justices

OPINION

Mr. Justice Van Orsdel delivered the opinion of the Court:

VAN ORSDEL, Associate Justice:

A suit was brought in the Supreme Court of the District of Columbia December 8, 1921, by Jak Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, hereafter referred to as the plaintiffs, under section 9 of the Trading with the Enemy Act, as amended June 5, 1920, 41 Stats. 977, to recover from the Treasurer of the United States and the Alien Property Custodian proceeds of the sale of 12,825 shares of the capital stock, together with accrued dividends, of the Locomotive Superheater Company, a Delaware corporation. This property was seized by the Alien Property Custodian during the war as the property of the Schmidt'sche Heissdampf Gesellschaft, a German corporation.

After the suit was instituted Jak. Robert Sigg-Fehr died, and Henry Escher was appointed ancillary administrator of his estate and substituted as plaintiff in his stead. After protracted litigation it was adjudged that the plaintiffs were citizens of the Confederation of Switzerland and resi-

dents of the City of Zurich, and as such entitled to recover the property seized. A decree was accordingly entered January 19, 1928, for the return to the plaintiffs of the proceeds from the sale of the stock amounting to $2,565,000.00, with accumulated earnings thereon. This was subsequently paid to the plaintiffs by the Alien Property Custodian and the Treasurer, with a deduction of $55,909.83 for administrative expenses.

The present action is on a rule to show cause why the amount so deducted should not be paid over to the plaintiffs; and from a decree directing such payment the Alien Property Custodian and the Treasurer have appealed.

Under section 6 of the Trading with the Enemy Act, 40 Stat. 415, the President was authorized to appoint an Alien Property Custodian and to employ "and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act."

By authority of the Act an executive order was issued on July 16, 1918, which, among other things, provides: "All costs and expenses incurred by reason of or in respect of, and all claims and demands of every kind, character and description based upon or arising out of, the custody, management, administration, protection, preservation and control of any such property, and the conduct or other operation of any such going business or other undertaking and the sale or other disposition of any such property, shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which, on account of which, or in respect of which such cost, expenses, claim or demand shall have been incurred and shall have arisen or been created; provided that whenever such property or the income therefrom or the assets of any such going business or other undertaking shall be insufficient therefor, such cost, expenses, claim or demand shall be charged thereto, but may be paid or satisfied out of money or other property received from, or as the property of, the same enemy."

By the Act of March 4, 1923, 42 Stats. 1511, the Alien Property Custodian was authorized to pay the taxes assessed against property held by him and the necessary expenses incurred by him or any depository for him in se-

curing the possession, collection, or control of money or other property seized by him or in protecting or administering the same out of the funds so seized.

Section 12 of the Trading with the Enemy Act, as amended March 28, 1918, 40 Stats. 459, provides: "The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or other ownership thereof in like manner as though he were the absolute owner thereof."

Recognizing the duties and authority thus conferred upon the Alien Property Custodian, Congress in the Act of May 16, 1928, making appropriations for the executive office and executive bureaus, boards, commissions, etc., provided: "All expenses of the office of the Alien Property Custodian authorized by the Act entitled 'An Act to confine, regulate, and punish trading with the enemy, and for other purposes,' approved October 6, 1917 as amended, including compensation of the Alien Property Custodian at not to exceed $10,000 per annum; shall be paid from interest and collections on trust funds and other properties under the control of such Custodian."

It will thus be observed that it was the policy of Congress and the Executive Department, through its orders, to require the payment of the costs of administration under the Alien Property Act to be deducted from the funds administered. We are of opinion that the contention of the plaintiffs that this rule should not be applied to property that was afterwards found to have been wrongfully seized is without merit.

If the seizure and detention of the property can be sustained as a justifiable circumstance of war, the conditions imposed for its return may be charged with such reason-

able restrictions as may be deemed proper. Clearly the expense of executing the trust, declared by law to exist in the Alien Property Custodian, even as to property which has been ultimately found to have been seized by mistake, cannot be said to be so unfair and unreasonable as to fall within the condemnation of equity. No charge of fraud or arbitrary conduct is here made against the officials of the government. Every reason obtained for believing the property seized to be enemy owned, and the determination of the question of whether or not it was properly or improperly seized was one for the courts, which in this instance, as in many others, meant extended litigation.

Congress and the President were here exercising a war power, employed to cripple the enemy in the conduct of hostilities in such manner as to operate beneficially to the United States and their allies. At such times, in dealing with a public enemy, statutory and constitutional limitations affecting property rights have little force. It is sufficient to warrant the seizure, detention, and even the confiscation of enemy owned property that the owner or the reputed owner be a resident of the enemy's country. In Miller vs. the United States, 11 Wall. 268, 305, the court, construing the Civil War Acts of Congress of August 6, 1861 and July 17, 1862, known as the Captured and Abandoned Property Acts, said: "The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. It is argued that though there are no express constitutional restrictions upon the power of Congress to declare and prosecute war, or to make rules respecting captures on land

and water, there are restrictions implied in the nature of the powers themselves. Hence it is said the power to prosecute war is only a power to prosecute it according to the law of nations, and a power to make rules respecting captures is a power to make such rules only as are within the laws of nations. Whether this is so or not we do not care to inquire, for it is not necessary to the present case. It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation."

This statement of the law is but an epitome of the sanction that the courts have always placed upon the power of Congress in time of war to authorize the seizure, through executive channels, of property not only enemy owned but of property believed to be enemy owned, providing always that there is adequate provision made for the return of property seized by mistake.

It further appears in this case that from the promulgation of the Executive Order of February 26, 1918, down to

the present time the uniform practice has been indulged by the Custodian, approved by the Comptroller, of deducting from the several trusts administered sufficient amount to cover the administrative expenses incident thereto. The construction thus given by the officers charged with the duty of execution will not be lightly considered by the courts or overruled without impelling reasons. United States vs. Moore, 95 U. S. 760; Brown vs. United States, 113 U. S. 568; United States vs. Johnston, 124 U. S. 236; Robertson vs. Downing, 127 U. S. 607. In corroboration of this view, the Act of March 4, 1923, authorizing the Custodian "to pay the necessary expenses incurred by him or by any depository for him in securing the possession, collection, or control of any such money or property, or in protecting or administering the same", amounts to Congressional confirmation of the practice theretofore existing to the effect that from each trust a sum sufficient to pay the expenses of collecting, protecting, and administering the same shall be deducted. It must be assumed that Congress was familiar with its own Acts, as well as the Executive Orders in force, and the long continued and consistent practice of the Department in administering the affairs pertaining to the seizure, retention, control, and ultimate return of alien property. Possessing this information, the conclusion is irresistible that it was intended by the late Act of May 16, 1928, to approve and confirm the procedure thus established.

We think it not unreasonable, in the light of the legislation, the Executive Orders, and the war power of Congress, to sustain a policy which imposes upon the property, though ultimately found to have been mistakenly seized, the expense incurred in protecting, disposing of, or investing it. This is but the application of a general rule of Civil procedure in connection with the administeration of trusts. Perry on Trusts and Trustees, 6 (Ed.) Vol. 2, Sec. 910; Trustees vs. Greenough, 105 U. S. 527, 532; Woodruff vs. New York R. R. Co., 129 N. Y. 27.

The decree is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Endorsed: No. 4777. H. T. Tate, as Treasurer of the United States, Howard Sutherland, as Alien Property Cus-

todian, et al., Appellants, vs. Henry Escher, Ancillary Administrator &c., et al. Opinion of the Court per Mr. Justice Van Orsdel. Court of Appeals. District of Columbia. Filed June 3, 1929. Henry W. Hodges, Clerk.

Monday, June 3rd, A. D. 1929.

* * * * * * *

No. 4777, April Term, 1929

H. T. Tate, as Treasurer of the United States; Howard Sutherland, as Alien Property Custodian, and Others, Appellants,

vs.

Henry Escher, Ancillary Administrator of Jak Robert Sigg-Fehr, Deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gams

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Van Orsdel, June 3, 1929.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4777

H. T. TATE, as Treasurer of the United States; Howard Sutherland, as Alien Property Custodian, and Others, Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gams, Appellees

APPLICATION FOR TRANSCRIPT ON CERTIORARI

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

Spier Whitaker, Lawrence A. Baker, Attorneys for Appellees.

[Endorsed:] No. 4777. H. T. Tate, as Treasurer of the United States, Howard Sutherland, as Alien Property Custodian, and others, Appellants, vs. Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, Appellees. Application for transcript on certiorari. Lawrence A. Baker, Spier Whitaker, Attorneys for Appellees, 908 Wilkins Building, Washington, D. C., Court of Appeals, District of Columbia. Jul. 9, 1929. Henry W. Hodges, Clerk.

MEMORANDUM: Resignation of Frank White and appointment of H. T. Tate as Treasurer of the United States suggested and motion to substitute H. T. Tate, Treasurer of the United States for Frank White, resigned, filed August 4, 1928.

Saturday, August 4th, A. D. 1928.

* * * * * * *

No. 4777

FRANK WHITE, as Treasurer of the United States; HOWARD SUTHERLAND, as Alien Property Custodian, and Others, Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased, et al.

On Consideration of the motion to substitute H. T. Tate as Treasurer of the United States as party appellant in the above entitled cause in the place of Frank White, resigned, it is ordered by the Court that said motion be and the same is hereby granted.

---

* * * * * * *

MEMORANDUM: Retirement of H. T. Tate and appointment of Walter O. Woods as Treasurer of the United States suggested and motion to substitute Walter O. Woods, Treasurer of the United States for H. T. Tate, retired, filed August 16, 1929.

Thursday, August 22nd, A. D. 1929.

* * * * * * *

No. 4777

H. T. TATE, as Treasurer of the United States, et al., Appellants,

vs.

HENRY ESCHER, &c., et al.

The retirement of H. T. Tate and the appointment of Walter O. Woods as Treasurer of the United States having been suggested, it is on motion filed herein now here ordered by the Court that Walter O. Woods, as Treasurer of the

United States, be and he is hereby made party appellant in the above entitled cause in the place and stead of H. T. Tate, retired, counsel for appellants consenting to said substitution.

* * * * * * *

COURT OF APPEALS, DISTRICT OF COLUMBIA, APRIL TERM, 1928

No. 4777

WALTER O. WOODS, as Treasurer of the United States; HOWARD SUTHERLAND, as Alien Property Custodian, and Others, Appellants,

vs.

HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gams, Appellees

SUPPLEMENT TO APPLICATION FOR TRANSCRIPT ON CERTIORARI

The Clerk will please supplement the designation in the Application for Transcript on Certiorari heretofore filed in this cause by adding thereto the following:

Order substituting H. T. Tate as Treasurer of the United States in the place and stead of Frank White.

Order substituting Walter O. Woods as Treasurer of the United States in the place and stead of H. T. Tate.

Spier Whitaker, Lawrence A. Baker, Attorneys for Appellees.

Service of a copy of the foregoing acknowledged this 22nd day of August, 1929.

Thomas E. Rhodes, Attorney for Appellants.

(Endorsed: No. 4777. Walter O. Woods, as Treasurer of the United States, et al., Appellants, vs. Henry Escher &c., et al. Supplement. Court of Appeals, District of Columbia, filed Aug. 23, 1929. Henry W. Hodges, Clerk.)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 79, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, per designation of counsel, in the case of Walter O. Woods, as Treasurer of the United States, Howard Sutherland, as Alien Property Custodian, and others, Appellants, vs. Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, No. 4777, April Term, 1929, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 23rd day of August, A. D. 1929.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, by Moncure Burke, Deputy Clerk. (Seal Court of Appeals, District of Columbia.)

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Appeals Court of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,496. Court of Appeals, District of Columbia. Term No. 365. Henry Escher, ancillary administrator of Jak. Robert Sigg-Fehr, deceased; Gottfried Rudolph Baumann-Kienast, and Edmund Gams, petitioners, vs. Walter O. Woods, as Treasurer of the United States, and Howard Sutherland, as Alien Property Custodian. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1929. File No. 34,496.

FILE COPY

FILED
AUG 31 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 365

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,
Petitioners,

vs.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

SPIER WHITAKER,
Attorney for Petitioners.

LYTTLETON FOX,
LAWRENCE A. BAKER,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. ———

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,

Petitioners,

vs.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast and Edmund Gams, pray that a writ of certiorari issue to review the judgment

of the Court of Appeals of the District of Columbia entered in the above-entitled case on June 3, 1929 (R. p. 72), reversing a final order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928 (R. p. 60); and in support thereof, respectfully show:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners, as plaintiffs, brought suit in the Supreme Court of the District of Columbia under Section 9 of the Trading with the Enemy Act, alleging that they were the owners of certain property seized by the Alien Property Custodian during the war, that the seizure had been wrongfully made upon a finding that the property belonged to a certain German corporation, and praying that the property, or its proceeds and accretions, be returned to them. On January 19, 1928, a decree was entered in their favor (R. p. 46). No appeal was taken from said decree.

Pursuant to said decree, the Alien Property Custodian submitted to petitioners a partial statement of account (R. p. 53). This account showed Liberty Bonds in the amount of $489,000 par value and cash in the amount of $3,198,444.74 had been received by the Alien Property Custodian for the account of petitioners. The account did not purport to state or cover interest upon this amount of cash which had been covered into the Treasury of the United States, as required by the Trading with the Enemy Act. Disbursements from this cash in the amount of $891,000 were scheduled, leaving a net balance of $2,306,491.34, which balance, however, was scheduled as subject to "administration expense and expenses incidental to

release and additional charges of Dept. Justice, if any."

When the time came for payment, it developed that respondents had deducted and claimed the right to withhold as alleged "administration expense" the sum of $55,909.83. Petitioners disputed the rightfulness and lawfulness of this deduction and applied to the Supreme Court of the District of Columbia for a rule to show cause directed against the Alien Property Custodian and the Treasurer of the United States, as defendants, requiring them to show cause why they should not forthwith pay over the said sum thus withheld (R. p. 56). Respondents filed an answer and a motion to dismiss (R. p. 57) and petitioners filed a motion to strike the answer for insufficiency (R. p. 59). After argument an order and decree was entered in favor of petitioners finding the deduction and retention of said sum to be unlawful and without right and ordering respondents forthwith to pay said sum to petitioner (R. p. 60). From this order and decree respondents appealed to the Court of Appeals of the District of Columbia. That Court reversed the order and decree of the Court below and directed that the cause be remanded for further proceedings in accordance with its opinion (R. p. 72). Petitioners seek by this proceeding to have the case further reviewed by this Court.

QUESTIONS PRESENTED.

The issue presented to the Supreme Court of the District of Columbia and upon appeal to the Court of Appeals was the sufficiency in law of the answer of respondents to the rule to show cause. The pertinent portion of this answer is short and reads as follows:

> "Further answering said paragraph these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." (R. p. 58)

We respectfully ask this Court to note that this answer does not allege directly or by any reasonable inference that the sum withheld, or any part of it, had been disbursed in connection with petitioners' property, nor that it represented the amount of expenses incurred in any way in connection with respondents' property nor that it represented the cost of seizing, preserving, or administering such property. It admits the taking of this sum out of the money of the petitioners as administrative expense but does not allege that any expense had, in fact, been incurred nor does it tend in any way to justify the taking of this amount even if it had been conceded that any sum was properly withheld on this account.

The calculation shows that this sum withheld constitutes two per cent (2%) of the amount of money and property shown on the statement of account as held for petitioners.

Petitioners dispute the right of respondents to withhold any part of their money or property to be applied toward the cost of the administering of the office of the Alien Property Custodian and, in addition, claim that even if any sum can be withheld upon that ground, the Alien Property Custodian must allege and, if controverted, prove that the amount withheld represents

only a fair and reasonable cost of administering their money and property.

In particular, they dispute the right of the Alien Property Custodian to pay the expenses of running his office by appropriating from property wrongfully seized by him an amount, or fixed percentage, arbitrarily determind upon by him.

They claim that there is no statute or rule of law which does or could give to the Alien Property Custodian any such right or power. The decision of the Court of Appeals in effect sustains the act of the Alien Property Custodian in depriving petitioners of a portion of their money without due process of law and of appropriating it to public use, to wit, the administering of his office, without just compensation to petitioners.

REASONS FOR ALLOWANCE OF THIS PETITION.

1. The judgment and opinion of the Court of Appeals erroneously construes the Act of Congress, known as Trading with the Enemy Act and the various Acts amending and supplementing that statute.

2. The judgment and opinion of the Court of Appeals erroneously failed to give due effect to the provisions of the Constitution of the United States, to wit: The provisions of Article V of the amendments.

3. The questions presented here have not heretofore been specifically and directly presented to this Court.

4. The questions presented here are of major importance, involving the construction of the Act of Congress known as the Trading with the Enemy Act and the acts amending and supplementing that statute and affecting all persons, not enemies, whose property was

erroneously seized by the Alien Property Custodian, including citizens of the United States and all nations either allied with or friendly with the United States during the war.

5. The decision of the Court of Appeals by implication conflicts with the decision of the Circuit Court of Appeals for the ninth Circuit in *Vowinckel vs. Sutherland*, 24 Fed. (2nd) 196 and decisions of this Court in *Central Union Trust Company vs. Garvan*, 254 U. S. 554; *Stoehr vs. Wallace*, 255 U. S. 239; *Henkles vs. Sutherland*, 271 U. S. 298; and *Trustees vs. Greenough*, 105 U. S. 527.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 4777, Walter O. Woods et al. vs. Henry Escher et al. and that the said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,

By SPIER WHITAKER,
Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. ———

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,
Petitioners,

vs.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

No opinion upon the matter now presented was written by the Justice of the Supreme Court of the District of Columbia except to the extent that the order entered by him on April 2, 1928 (R. p. 60), might be construed as an opinion. The opinion of the Court of Appeals

of the District of Columbia reversing the order and decree of the Supreme Court of the District of Columbia has not yet been reported in the Federal reports but appears in the record (pp. 66-71), and in the Washington Law Reporter, Vol. 57, p. 472.

JURISDICTION.

The judgment of the Court of Appeals of the District of Columbia was entered on June 3, 1929 (R. p. 72).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 23, 1925 (Chapter 229, 43 St. 938).

STATEMENT OF THE CASE.

For the purpose of argument it is necessary to amplify somewhat the statement of facts in the petition.

The original suit was begun on December 8, 1921, by the filing of a bill of complaint under Section 9 of the Act of Congress known as the Trading with the Enemy Act (Chapter 106, Sec. 9, 40 St. 419). The bill of complaint alleged that the plaintiffs were citizens of the Republic of Switzerland, residing in that country; that they were the owners of certain property consisting of 12,825 shares of the capital stock of a Delaware corporation known as Locomotive Superheater Company, together with Liberty Bonds to the amount of $490,000 par value and cash, representing dividends that had accrued and accumulated upon such stock subsequent to January 1, 1917; that the Alien Property Custodian had wrongfully seized said shares of stock, bonds and cash upon the ground that the same was the property of a certain German corporation; that the said shares of stock had been wrong-

fully and without authority of law transferred by the Alien Property Custodian to the Director General of Railroads for a purported purchase price of $200 per share; that thereafter the Director General of Railroads had sold the stock for the price of $248 per share and in addition had received in dividends an additional profit of approximately half a million dollars. The relief prayed for was the return of the proceeds received from the sale of the shares of stock, the release and return of the Liberty Bonds and cash seized by the Alien Property Custodian and the release and payment over of the accumulations and additions to this money and property and the income therefrom (R. pp. 1-15 incl.). The Court of Appeals of the District of Columbia in an interlocutory decree held that the Director General of Railroads could not be joined in that action and that plaintiffs were limited in their recovery to the property seized by the Custodian and the $200 per share paid over to him by the Director General of Railroads. (285 Fed. 949)

On December 10, 1927, after a long and hard fought trial, an opinion was filed by one of the Justices of the Supreme Court of the District of Columbia, holding that the plaintiffs were entitled to the relief sought (R. p. 46). Thereafter on January 19, 1928, final decree in favor of plaintiffs was entered (R. p. 46-47).

During the course of the trial one of the original plaintiffs, Jak Robert Sigg-Fehr, died and Henry Escher was appointed ancillary administrator of his estate in the District of Columbia and substituted as a party plaintiff.

The plaintiffs claimed title to the shares of stock by virtue of a purchase in November, 1916, from a

German corporation which up to that time had been the owner. The defendants disputed the validity and *bona fides* of the purchase and the Custodian seized the property upon finding that it still belonged to this German corporation. The decree of January 19, 1928, sustained the purchase and held that the original three plaintiffs were the owners of the 12,825 shares of stock with dividends thereon declared subsequent to January 1, 1917, and directed the defendants, the Alien Property Custodian and the Treasurer of the United States, to

> "pay, convey, transfer, assign and deliver to said plaintiffs the said money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the Trading with the Enemy Act and amendments thereto; and also deducting therefrom the sum of $10,000 to be paid to the Special Master in accordance with this decree."

This decree was consented to "as to form" (R. p. 48) and no appeal therefrom was taken.

Pursuant to this decree and in purported compliance with it, the respondents here as defendants in the Court below, submitted the statement of account that is referred to in the petition filed herewith (See copy of statement of account R. p. 53). As is stated in the petition the technical question which petitioners herein seek to have this Court review is the sufficiency in law of the answer of respondents to the rule to show

cause issued out of the Supreme Court of the District of Columbia on March 23, 1928 (See petition for rule R. p. 50-56; Rule R. p. 56-57; motion of respondents to discharge and answer R. p. 57-58; motion by plaintiffs to strike out answer for insufficiency R. p. 59-60; order R. p. 60).

The points of law which are involved, both of statutory construction and constitutional law, are stated in the summary of the argument (see page 13, *infra*).

SPECIFICATIONS OF ERRORS TO BE URGED.

The errors which petitioners urge as grounds for the granting of the writ of certiorari and for reversal of the judgment of the Court of Appeals of the District of Columbia are;

1. The Court of Appeals erred in not holding that the answer of the Alien Property Custodian and the Treasurer of the United States to the rule to show cause issued out of the Supreme Court of the District of Columbia failed to set forth any facts sufficient to justify the deduction and withholding from the money of these petitioners the sum of $55,909.83, or any part thereof.

2. The Court of Appeals erred in holding that the Alien Property Custodian had the right to deduct from the money of these petitioners any sum or sums other than the amount of expenses reasonably and actually incurred by him for protecting or administering the money and property of these petitioners and which was directly attributable to or directly incurred because of such money or other property.

3. The Court of Appeals erred in not holding that the Alien Property Custodian had no right to withhold or deduct from the money of these petitioners, as

so-called administrative expense, a percentage thereof arbitrarily fixed or determined upon by the Alien Property Custodian.

4. The Court of Appeals erred in finding that the sum of $55,909.83 deducted and withheld by the Alien Property Custodian from the money of these petitioners represents expenses incurred in protecting or administering the money and other property of these petitioners held by the Alien Property Custodian and/or the Treasurer of the United States.

5. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a depriving them of their property without due process of law in contravention of the provisions of the Constitution of the United States.

6. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a taking of their property for public use without just compensation.

7. The Court of Appeals erred in not affirming the order and decree of the Supreme Court of the District of Columbia entered on April 2, 1928.

8. The Court of Appeals erred in reversing the order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent provisions of the Trading with the Enemy Act are printed in an appendix annexed hereto and will be referred to in the course of the argument.

In addition the provisions of the fifth amendment to the Constitution of the United States were invoked by petitioners in the Court of Appeals and are relied upon here.

SUMMARY OF THE ARGUMENT.

POINT A. The Trading with the Enemy Act, as amended, does not authorize the Alien Property Custodian to charge against and deduct from non-enemy property wrongfully seized any sum on account of the overhead or fixed expenses of administering his office, but only actual disbursements or expenses necessarily incurred in respect of or on account of the particular money and property involved and which are directly attributable thereto.

POINT B. Even if the Alien Property Custodian was and constitutionally could be authorized to charge against the money and property of petitioners any part of the general expense or overhead of his office, the appropriation therefrom of an arbitrary fixed percentage of its amount and value is not justifiable.

POINT C. Irrespective of the character of costs and expenses that may be charged against the money and property of petitioners and the basis for fixing the amount that can be charged, the amount to be deducted and withheld on such account cannot be fixed or settled by the Alien Property Custodian, but petitioners are entitled to have their day in Court as to the amount of deductions as well as the propriety of any deduction.

ARGUMENT.

These three points are closely interwoven, in fact they might almost be stated as a single point. For that reason, we shall discuss them as one in the belief that

the argument will be shortened and perhaps clarified.

Respondents predicate the right of the Alien Property Custodian to make the deduction involved in this appeal upon Section 24 of the Trading with the Enemy Act, which was added to the original Act by the amendment of March 24, 1923, generally known as the Winslow Bill; upon certain executive orders previously issued by the President under the purported authority of that Act, and upon the general principles applicable to the administration of trust property. The Alien Property Custodian being a public officer, whose rights, duties and obligations are fixed by statute and there being express statutory enactment upon this question, we submit that the statute must govern. Executive orders and executive practice no matter how long continued and general rules of equity cannot change the meaning of a statute nor enlarge its scope. We present the matter therefore solely as a question of statute and constitutional right.

The statute, omitting inapplicable clauses, reads as follows:

> "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depository for him in securing the possession, collection, or control of any such money or property or in protecting or administering the same. Such * * * expense, shall be paid out of the moneys or other property * * * in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that claim may have been filed or suit instituted under this Act."

For comparison with this statutory statement of the Custodian's right in this regard, we quote again the

answer of respondents to the rule to show cause, which sets forth their claim of right and their justification for the withholding now in question.

> "Further answering said paragraph, these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,-909.83, as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid."

This pleading was framed in disregard of the statute or the language used was intentionally selected because the pleader could not allege that the amount deducted and retained represented the "*necessary expenses* incurred by the Custodian or by any depository for him." In either event the answer is insufficient. It admits the deduction and withholding of the sum in question from the money of petitioners and then in sole justification therefor boldly and baldly states that the money was appropriated not to reimburse the Custodian for any expense of any kind incurred in connection with or on account of petitioners' money or property but to be used in administering generally the money and property held by the Custodian.

This answer can be held sufficient as a matter of law only upon the theory that the Alien Property Custodian was invested with the power of appropriating from property in his custody whatever amount he might deem required to enable his office to be administered in the way he might think suitable and proper. Even respondents do not claim any such arbitrary

power, although the arguments made in their behalf in this case when carried to their logical conclusion lead dangerously close to it.

This point alone suffices to justify the decision of the Supreme Court of the District of Columbia, in the absence of any application upon the part of the defendants (respondents here) either in the lower Court or in the Court of Appeals, to amend the answer or plead further with respect to the sum in question. However, we did not rest our case in the Court of Appeals solely upon this rather narrow technical question although we did in brief and argument make this point; nor do we predicate the application to this Court solely upon that ground. We do assert, most earnestly, however, that the effect of holding such an answer to be sufficient is to deprive these petitioners of a very substantial sum of money without giving them their day in Court. There is nothing in this answer which could be traversed or denied in any way and it tenders no issue of fact whereby petitioners, as plaintiffs, in the Supreme Court of the District of Columbia could show that the amount retained was excessive or whereby in any other way they could secure a judicial finding as to just what in fact it did cost the respondents to administer this property.

In the Court of Appeals both in written briefs and upon the oral argument, it was asserted with great earnestness on behalf of respondents, that the practice of deducting for "administrative expense" a fixed percentage of all money and property seized irrespective of the enemy or non-enemy ownership and of the rightfulness or wrongfulness of the seizure had been in effect for many years, and that a judicial decision now that this practice was unauthorized or improper,

would create chaos in the Custodian's office. It was argued also that it was impracticable to keep an exact record of the time of each person in the Custodian's organization spent upon each separate item of property or to apportion against the various items or lots of money and property held, the fixed expenses, such as salaries of the Alien Property Custodian and of other executives in his organization, rent and other similar items. These reasons, it was claimed, justified the practice of creating a fund for administering the office by appropriating from all of the money and property held a fixed or uniform percentage of the amount or value.

At the close of the argument in the Court of Appeals there was cited on behalf of appellants there, the respondents here, the Appropriation Bill for the fiscal year ending June 30, 1929, which provided that all expenses of the office of the Alien Property Custodian

> "shall be paid from interest and collections on trust funds and other properties under the control of such Custodian". (45 St. 573, 574, ch. 580)

It was argued that this enactment constituted an approval by Congress of the practice of deducting from all property in the custody of the Custodian a fixed percentage to cover so called "administrative expenses."

With respect to the money and property of these petitioners, it was asserted, although there was nothing in the pleadings and not a scintilla of proof in the record to justify it, that

> "the sum of $55,909.83, the amount here claimed, is no more than a fair and reasonable charge for collecting, protecting and administering the appellees' seized property."

The Court of Appeals, with all due deference to that Court, would appear to have been influenced unduly by this argument of expediency and to have accepted as proven the unsupported assertions of fact. The first five pages of its opinion in this case are taken up with a discussion of the War Power of seizing enemy property and a justification of the seizure by the Custodian of the money and property of these petitioners. At no time in this case has that power been questioned. Petitioners here, as plaintiffs, did assert that the seizure, although made under full authority of law, nevertheless was wrongfully made in that the property was not enemy owned and therefore not subject to final seizure. The final decree of the Supreme Court of the District of Columbia entered on January 19, 1928, so determines.

With respect to the money of Petitioners withheld by the Custodian, the Court says in a short paragraph at the end of the opinion:

> "We think it not unreasonable, in the light of the legislation, the Executive Orders, and the war power of Congress, to sustain a policy which imposes upon the property, though ultimately found to have been mistakenly seized, the expense incurred in protecting, disposing of, or investing it. This is but the application of a general rule of Civil procedure in connection with the administration of trusts. Perry on Trusts and Trustees, 6 (Ed.) Vol. 2, Sec. 910; Trustees vs. Greenough, 105 U. S. 527, 532; Woodruff vs. New York R. R. Co., 129 N. Y. 27.
>
> The decree is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion."

This opinion, we submit, "begs the question" which was submitted for decision. It assumes that the

amount withheld in fact represents "the expense incurred in protecting, disposing of, or investing it." In the brief filed with that Court, and upon the oral argument, particular attention was called to the state of the pleadings hereinbefore referred to, and exception was noted to the argument, made without pleading or proof to support it, that the sum withheld was no more than the cost of protecting and administering this property. We asserted then and assert now that it bears no relation whatsoever to that cost; and greatly exceeds the cost of administering the money and property of appellees upon any theory and no matter what reasonable amount of overhead be included.

We have no quarrel with the political theory that the cost of administering the Alien Property Custodian's office should be paid out of *enemy* property which was rightfully seized; nor are we called upon in this case to discuss the political advisability of delegating to the Alien Property Custodian the power of writing his own appropriation bills by leaving to him the power to take from property in his custody for administrative purposes whatever amount he may, in his uncontrolled discretion, see fit to take. As a matter of practical administration, the policy of apportioning the amount deducted for administrative expense among the owners of the seized property, according to the value of the property and the amount of money held, has much in its favor; and in so far as this is limited to enemy property that was properly seized, Congress unquestionably and undeniably has the power so to authorize and direct.

To apply this policy to non-enemy property mistakenly seized is, we submit, an entirely different thing.

The Court of Appeals refers to the reasonableness or unreasonableness of the policy in question. This, of course, is ordinarily for Congress and not the Court to consider. In this case we believe it does have a bearing both upon the construction of the statute and the constitutionality of the policy in question as applied to non-enemy property wrongfully or mistakenly seized.

We see no justice in making these petitioners pay for the mistakes of the Alien Property Custodian. It is quite true, as this Court has said (*Central Union Trust Company v. Garvan,* 254 U. S. 554, 568) that in the course of seizing enemy property mistakes would occur. The cost of such mistakes would seem to be one of the costs of conducting the war to be paid like all the other costs of the war were paid; just as in the case of industrial enterprises, the cost of accidents is considered one of the costs of conducting the business, to be borne as the other costs of that business are borne. In the case of the Alien Property Custodian, Congress may undoubtedly, if it sees fit, reimburse the Treasury out of enemy property properly seized; or provide for payment in the first instance of such costs out of such property. To make the victim of the Alien Property Custodian's mistake bear the Custodian's cost of such mistake seems to us to lack every element of reasonableness or fairness.

The distinction between such administrative costs and the expenses directly attributable to the property involved, and which the owner of the property probably or presumably would have had to pay if the property had not been seized, is one frequently recognized and given effect to by the courts. See

Greer v. Greer, 5 Redf. 214;
Weston v. Watts, 45 Hun. 219, 224;
Union Distilling Co., v. Union Pharmaceutical Company, 56 N. Y. 417, 421-422.

The case of *Trustees v. Greenough* decided by this Court, and referred to by the Court of Appeals, makes a similar distinction (See 105 U. S. 527, 537-538).

The language used in Section 24 of the Trading with the Enemy Act would indicate on its face that Congress had this same distinction in mind when the statute was enacted. If it had been intended then that the Custodian should pay out of seized property all of the expenses of running his office, the total amount to be apportioned according to the amount of the money and value of the property, it would have been a simple matter to have so stated. This statute on the contrary states first that the expense must be *necessary;* and in addition states specifically that the expense incurred in respect of each item of money or property, is to be paid out of the particular money or property in respect of which the expense was incurred. If such money or property is insufficient for that purpose, then it can be paid out of other money and property *only to the extent that other money or property is held for the same person.* None of these provisions would be necessary or even applicable if it had been intended to authorize the Custodian to create an expense fund by levying a general assessment upon all of the property in his custody.

In this connection we deem it proper to state that we do not concede the constitutionality of all of the provisions of Section 24 of the Trading with the Enemy Act. It is our view that any expense incurred in effecting seizure of property that later proves to have

been wrongfully or mistakenly seized cannot properly be charged against or paid out of such property; nor can expenses incurred by the Alien Property Custodian and/or the Treasurer of the United States in resisting the suit of the rightful owner to recover such possession be included within the purview of the word "protect." In the case of *Vowinckle v. Sutherland*, 24 Fed. (2nd) 196, the Circuit Court of Appeals for the Ninth Circuit has expressly so held. In spite of this decision the Alien Property Custodian is still continuing to tax against non-enemy property wrongfully seized, not only the expenses of the Alien Property Custodian's office incurred in attempting to prevent the original owner from recovering his property, but the expenses of the Department of Justice as well. Reference to the statement of account submitted (R. p. 53) will show the deduction of various items on this account, including one attorney's fee in the amount of $10,000; and in addition to these expenses directly attributable to this property, salaries and other expenses of the Department of Justice, so it was stated in open Court upon the hearing of the rule to show cause in the Supreme Court of the District of Columbia, are paid out of the administrative fund created by deduction of two per cent from the money and property of these petitioners and of others. The opinion of the Court of Appeals makes no reference to the Vowinckle case, but its decision conflicts directly with the decision in that case.

Furthermore we deny the constitutionality of that provision which states such expenses may be paid out of the money, or property. Furthermore we deny the constitutionality of that provision which provides that such expenses may be paid out

of the money or property held "notwithstanding the fact that a claim may have been filed or suit instituted under this act." Section 9 of the Trading with the Enemy Act has provided from the original enactment of that statute, that "If suit shall be instituted then such money or property shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." It was upon the strength of these very provisions that this Court sustained against the charge of unconstitutionality, the provisions of Section 7 (c) of the Act which were interpreted as granting to the Custodian the power of seizing property "supposed to belong to the enemy" and then requiring the true owner, if not an enemy, to assert his claim and establish his right to return of the property by suit under Section 9 (*Central Union Trust Company v. Garvan, supra*). If, notwithstanding suit disputing the rightfulness of the Custodian's seizure, the Custodian can appropriate out of the seized property, without notice to the owner and without any opportunity of protest or hearing, judicial or otherwise, whatever amount the Custodian might see fit to take under the guise of administrative expense or for payment of taxes, then something more is gained by the seizure than mere custody and the property is not merely attached "to make sure that it is forthcoming

if finally condemned and no more." This Court in that case construed the statute as requiring that "the property in case of suit is to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result." This means the whole of the property and not such part as may be left after the custodian has made his deductions. Unless the statute as a whole does make such requirement the remedy of Section 9 is far from adequate. This provision of section 24, inserted long after the enactment of the original statute and after the act had been held constitutional, because it provided just the opposite of this provision, and after all seizures and the right to make seizures had ceased, must be held both unfair and unconstitutional.

But, to return from this digression to the matter of general expense or overhead of the Custodian's office, we submit that even if such costs of running the Custodian's office be held as coming within the purview of this statute, nevertheless it does not follow that the amount deductible on such account is measureable or determinable by the value of the money or property involved. It is quite true that trustees of trusts voluntarily created, insurance premiums, lawyers' fees and other charges are often measured by the value of the property in respect of which the services have been rendered or the charges made. These cases are in no way analagous to the present situation. In such cases it is the benefit to the property or to the owner of the property and not the cost of the service of the person rendering the service which justifies measuring the charge by the value of the property. Such charges in addition include an element of compensation or profit. The Custodian, under no

theory of law or justice can make a profit out of non-enemy property wrongfully seized. The utmost that under any theory he can tax against such property is *actual cost* of administration—pretermitting discussion of just what kinds of expense are to be included within that term. That the cost of taking care of property is not measured by its value is one of those self evident truths of which a court will take judicial notice.

We take it to be fundamental that to take from property mistakenly or wrongfully seized by the Custodian, one cent more than the actual expense of protecting or administering such property, and to apply the money so appropriated to the general cost of administering the office of the Alien Property Custodian, amounts to the taking of such money for public use without just compensation and deprives the owner of such money of his property without due process of law.

To summarize, these petitioners contend:

First: That no part of the overhead or fixed expenses of administering the Custodian's office can be assessed against or paid out of their money and property mistakenly and wrongfully seized; that, as a matter of fact, such expenses would have been incurred by the Custodian, regardless of the seizure of petitioner's property; that there is no fairness or justice in making them pay for the mistake of the Alien Property Custodian in seizing their property; that the costs of such mistake should be borne by the United States as all of the other costs of carrying on the war were borne; and that Section 24 of the Trading with the Enemy Act, in which, if anywhere, the right to make the deduction must be found, does not contemplate or authorize the taxing of any such charges but only "ex-

penses necessarily incurred'' in respect of the money and property of these petitioners.

Second: That the policy of assessing seized property with two per cent of its value for ''administrative expenses'' assumes that the cost of administration is measured by the value of the property, which assumption is not true as a matter of fact and not justified as a matter of law.

Third: That even if it be permissible to deduct a percentage of the money and property mistakenly and wrongfully seized to cover the costs of ''protecting and administering'' such money and property, the percentage and therefore the amount to be deducted must be subject to judicial review; and unless the owner of such money and property is given his day in court as to the amount to be deducted and withheld under the guise of administrative expense, no matter by what method or rule such amount is to be measured, such owner is deprived of his property in violation of the provisions of the constitution.

We deem it unnecessary to cite to this court its decisions holding that these constitutional provisions protect the alien as well as the citizen, and the owners of this property at the time of seizure, having been citizens of the Republic of Switzerland, a friendly nation, are entitled to the same treatment which would be accorded to a citizen of the United States whose property had been seized by the Alien Property Custodian upon a mistaken assumption that it belonged to an enemy under the Trading with the Enemy Act. For these reasons it is respectfully submitted that the petition for a writ of certiorari in support of which this brief is filed, should be granted and the decision

of the Court of Appeals of the District of Columbia reviewed by this Court.

Respectfully submitted,

SPIER WHITAKER,
Attorney for Petitioners.

LYTTLETON FOX,
LAWRENCE A. BAKER,
Of Counsel.

APPENDIX.

The pertinent Sections of the Act entitled "An Act to define, regulate, and punish trading with the enemy and for other purposes," are as follows:

"*Section 7(c)* If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act. * * *

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." Act of October 6, 1917, as amended November 4, 1918.

"*Section 9(a)* That any person not an enemy or ally of enemy claiming any interest, right, or

title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the

court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.'' Act of October 6, 1917, as amended June 5, 1920.

'*Section 12* The Alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the obsolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of

time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the Alien Property Custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

"*Section 24.* The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, col-

lection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act." Act March 4, 1923.

ARTICLE V.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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CHARLES ELMORE CR

No. 365.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

HENRY ESCHER, Ancillary Administrator of JAK. ROBERT SIGG-FEHR, deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST and EDMUND GAMS, Petitioners,

v.

WALTER O. WOODS, as Treasurer of the United States, and HOWARD SUTHERLAND, as Alien Property Custodian.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

HENRY ESCHER, Ancillary Administrator of Jak. Robert Sigg-Fehr, deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST and EDMUND GAMS,
Petitioners,

vs.

WALTER O. WOODS, as Treasurer of the United States, and HOWARD SUTHERLAND, as Alien Property Custodian.

ON CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONERS.

Opinions Below.

The opinion of the Court of Appeals of the District of Columbia is reported under the title "*Tate, United States Treasurer, et al.* v. *Escher, et al.*" in 33 F. (2nd) 556. It will be found in the record at page 90. No opinion was rendered in the Supreme Court of the District of Columbia in connection with the order appealed from and now presented to this Court.

After the decision in the Supreme Court of the District of Columbia Frank White resigned as Treasurer of the

United States and his successor H. T. Tate was substituted in his place as a party appellant (R., p. 98); and then H. T. Tate retired as Treasurer of the United States and Walter O. Woods, his successor as Treasurer of the United States, was substituted for him as a party in this suit (R., pp. 98-99).

Jurisdiction of This Court.

The judgment now presented for review is a final judgment of the Court of Appeals of the District of Columbia dated June 3, 1929 (R., p. 96) reversing a decree of the Supreme Court of the District of Columbia entered on April 2, 1928 (R., p. 84).

This cause is in this Court by virtue of an order filed October 21, 1929 (R., p. 101) granting petition of Plaintiffs-Appellees in the Court of Appeals—for a writ of certiorari. They will be referred to hereinafter as Plaintiffs and the defendants in the Supreme Court of the District of Columbia as Defendants.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement of the Case.

A. The Facts.

This case presents no disputed or controverted issues of fact. The questions of law arise out of a suit in equity brought in the Supreme Court of the District of Columbia under Section 9 of the Trading with the Enemy Act. The bill of complaint filed December 8, 1921, alleged that the Alien Property Custodian had seized certain money and property belonging to Plaintiffs, citizens of Switzerland, residing in that country, upon a wrongful or mistaken de-

termination that it belonged to a German corporation; and sought the release and return of the property or its proceeds, and its accretion and income. On December 10, 1927, after a long and hard-fought trial, the Supreme Court of the District of Columbia held that the Plaintiffs were entitled to the relief sought (see Opinion, R., pp. 64-65). On January 19, 1928, a final decree in favor of Plaintiffs was entered (R., pp. 65-66). This decree was consented to as to form, and no appeal was taken from it.

During the course of the trial one of the original plaintiffs, Jak. Robert Sigg-Fehr died, and Henry Escher was appointed Ancillary Administrator of his estate and substituted in his place as a party plaintiff (R., p. 30).

Pursuant to this decree and in purported compliance with it, the Alien Property Custodian submitted a statement of account (R., pp. 74-75). This account showed that Liberty Bonds and cash in the aggregate amount of $3,198,444.74 had been received by the Alien Property Custodian for the account of Plaintiffs; that disbursements from this cash in the amount of $891,953.40 had been made, and that there was on hand belonging to Plaintiffs a net balance of $2,306,491.34. It did not purport to cover interest upon or earnings from cash belonging to Plaintiffs covered into the Treasury of the United States, and it stated that the balance shown was subject to "administration expenses and expenses incidental to release, and additional charges of Dept. Justice, if any" (R., p. 75).

When the time for payment came it developed that the Defendants had deducted under the guise of so-called "administration expenses" and the Alien Property Custodian was claiming the right to retain for the use of his office the sum of $55,909.83. Plaintiffs, disputing the justice and lawfulness of this deduction, applied to the Supreme Court

of the District of Columbia for a rule directed against the Custodian and the Treasurer of the United States, requiring them to show cause why they should not be required forthwith to pay over the sum thus withheld (See Petition, R., pp. 69-78; Rule, R., pp. 79-80). Defendants filed a motion to dismiss and an answer (R., pp. 80-82); and plaintiffs filed a motion to strike out the answer for insufficiency (R., pp. 82-83).

After oral argument an order and decree was entered in favor of Plaintiffs finding the deduction and retention of this sum to be unlawful and without right, and ordering Defendants forthwith to pay this sum over to Plaintiffs (R., p. 84). From this order and decree Defendants appealed to the Court of Appeals of the District of Columbia. That Court reversed this decree of the Court below, and directed that the cause be remanded for further proceedings in accordance with its opinion (See order of reversal, R., p. 96; Opinion, R., pp. 90-95). It is this judgment of the Court of Appeals that Plaintiffs seek to have reviewed and reversed in this Court.

B. Question Presented.

The petition of Plaintiffs, upon which the rule to show cause issued, alleged in paragraph 6 (R., pp. 71-72) that the Alien Property Custodian had deducted from their money as alleged "administrative expenses" the sum of $55,909.83; that he was withholding and refusing to pay over this sum; and that in addition he claimed the right to make further deductions upon that account. The petition further alleged that this deduction was unauthorized by any valid provisions of the Trading with the Enemy Act and its amendments, and was contrary to the provisions of the final decree in favor of Plaintiffs and amounted to the taking of

the property of Plaintiffs without any authority of law. The sole excuse, justification or defense given by either of the Defendants for this appropriation of Plaintiffs' money is found in paragraph 6 of their answer, which reads as follows:

> "Further answering said paragraph, these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83, as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid" (R., pp. 81-82).

It is this answer that Plaintiffs moved to strike; and its sufficiency in law is the question which the record in this case presents.

This answer supposedly was framed in contemplation of Section 24(a) of the Trading with the Enemy Act which was added to the original statute by the amendment of March 24, 1923, generally known as the Winslow Bill (42 Stat. 1511-1516). This Section is set forth in full at pages 14-15 of this brief. Omitting inapplicable clauses, it reads as follows:

> "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such * * * expenses shall be paid out of the money or other property * * * in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or prop-

erty held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

The answer clearly is insufficient under this statute and it seems to us sets up no defense whatsoever. It "confesses" the charge of Plaintiffs, but does not even attempt to "avoid" it. It admits the taking, but alleges neither reason nor fact to justify it. The statement that the money had been paid into a fund, etc., is merely a statement as to what had been or would be done with the money. It is apparent, therefore, that the answer, though framed in contemplation of the statute, was drafted in utter disregard of it; and Defendants in arguing the case have wholly ignored their answer and the issue made by Plaintiffs' motion to strike it.

In the Court of Appeals they stated that the question presented by the appeal was: "Whether the Alien Property Custodian was authorized to deduct from the aggregate amount of appellees' seized property and accrued income therefrom an amount to cover the cost of collecting, protecting and administering such property." Under this they argued that the Alien Property Custodian, both as a trustee and under the provisions of the Trading with the Enemy Act, was authorized to deduct "all reasonable and proper expenses incurred by him (the Alien Property Custodian) in administering the trust", and that the sum deducted "is not more than a fair and reasonable charge for collecting, protecting and administering the appellees' seized property". All such arguments are unjustified and improper. The answer makes no allegation by direct statement or by inference that the amount withheld represents either the cost of or a reasonable charge for collecting, pro-

tecting or administering in any way the money and property of Plaintiffs and there is not a scintilla of proof of either in the record.

The Court of Appeals, however, appears to have been misled by these arguments because it bases its decision upon the unplead, unproven fact that the sum withheld represented "the expense incurred in protecting, disposing of, or investing" the property of Plaintiffs from which it was taken. (Last paragraph of Opinion, R. 95.)

In the brief filed in this Court in opposition to the petition of Plaintiffs for certiorari, substantially the same argument was presented although phrased in somewhat different language. It was asserted that "the Alien Property Custodian was constitutionally authorized to deduct from property seized by him a fair charge for administering it", and that "the deduction of $55,909.83 is a proper charge for expenses of administering an estate for ten years where the principal amounted to over $3,000,000 and the accumulated earnings thereon aggregated over $1,000,000" (Point I, p. 6; Point II, p. 11). In support of these contentions it was argued (pp. 12-13) that the amount deducted is a "reasonable charge" for administering the property of Plaintiffs and various facts or supposed facts with respect to such administration are cited and discussed.

As a result of objection made to this brief, there was filed on behalf of Defendants, a supplemental memorandum in which was admitted that no testimony was introduced at the hearing in the Supreme Court of the District of Columbia, at which the deduction in question was held unlawful; and that it was not meant to indicate that there was any testimony showing the exact cost of the administration of Plaintiffs' property. The contention was stated to be that

"it would be impossible to figure such costs" and "it was not feasible to apportion any aliquot part of the salaries of particular persons or other general expenses among the numerous estates handled". In addition, it was admitted that the amount deducted was 2% of the money and property from which the deduction was made.

Thus we have at last an admission from Defendants that the sum withheld does not represent the cost of administering Plaintiffs' seized property and that it is simply an assessment of 2% of its value, but upon what basis or in what way the Custodian fixed upon 2% as the amount of the assessment to be levied is not disclosed by either pleading or proof.

The contention now made in this Court is that "the sum deducted was not an unreasonable one for the Custodian to charge as administrative expenses" and that the Court of Appeals could decide this question of fact, as to which there is neither pleading nor proof of any kind, solely "from the facts which appear in the record in regard to the amount of the property and the time for which it was held." (See Supplemental Memorandum, p. 3, paragraph 3.)

Plaintiffs claim that the taking of their money in this way amounts to depriving them of their property without due process of law and its appropriation to public use, to wit, the administration of the office of the Alien Property Custodian, without just compensation.

They do not contest the deduction by the Custodian of all reasonable disbursements or expenditures necessarily made for the purpose of protecting their money and property and which are directly attributable to such money or property; but no such expenses are now in question. They

deny the right of the Custodian to pay any part of the general expenses or overhead of his office out of their property which was wrongfully or at least mistakenly seized by him, and in particular they contest his right to deduct on that account a percentage of their money and property arbitrarily fixed by him. They contend that as a matter of fact and of law the cost or expense of administering property is not and cannot be measured by the amount of value of that property, and that even if deduction of some percentage be permissible, the Custodian cannot fix arbitrarily upon what that percentage shall be.

The question which this case now presents to this Court therefore is whether the Alien Property Custodian was and constitutionally could be authorized to appropriate from non-enemy property wrongfully seized any amount on account of the overhead or general expenses of administering his office; and if so, whether the amount so to be deducted can be a percentage arbitrarily fixed by the Custodian.

Specification of Errors to be Urged.

1. The Court of Appeals erred in not holding that the answer of the Alien Property Custodian and the Treasurer of the United States to the rule to show cause issued out of the Supreme Court of the District of Columbia failed to set forth any facts sufficient to justify the deduction and withholding from the money of these petitioners of the sum of $55,909.83, or any part thereof.

2. The Court of Appeals erred in holding that the Alien Property Custodian had the right to deduct from the money of these petitioners any sum or sums other than the amount of expenses reasonably and actually incurred by him for

protecting or administering the money and property of these petitioners and which was directly attributable to or directly incurred because of such money or other property.

3. The Court of Appeals erred in not holding that the Alien Property Custodian had no right to withhold or deduct from the money of these petitioners, as so-called administrative expenses, a percentage thereof arbitrarily fixed or determined upon by the Alien Property Custodian.

4. The Court of Appeals erred in finding that the sum of $55,909.83 deducted and withheld by the Alien Property Custodian from the money of these petitioners represents expenses incurred in protecting or administering the money and other property of these petitioners held by the Alien Property Custodian and/or the Treasurer of the United States.

5. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a depriving them of their property without due process of law in contravention of the provisions of the Constitution of the United States.

6. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a taking of their property for public use without just compensation.

7. The Court of Appeals erred in not affirming the order and decree of the Supreme Court of the District of Columbia entered on April 2, 1928.

8. The Court of Appeals erred in reversing the order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928.

Summary of the Argument.

The Alien Property Custodian was not given, and constitutionally could not be given the right to appropriate from the money of these plaintiffs as so-called administrative expenses the sum of $55,909.83 or any part of it, and therefore the judgment of the Court of Appeals should be reversed and the decree of the Supreme Court of the District of Columbia affirmed because:—

A. The provisions of the Trading with the Enemy Act expressly limit the deductions for expenses to the amounts actually and necessarily incurred on account of the particular money and property from which the deduction is sought to be made; and

B. Even if this would include any part of the salaries and other general expenses of operating the Custodian's office—which we deny—the provisions of the Fifth Amendment to the Constitution do not permit the Custodian to appropriate under the guise of expenses any percentage of Plaintiffs' money and property much less a percentage arbitrarily fixed by him without notice to the owner; and

C. The bringing of Plaintiffs' suit under Section 9 of the Trading with the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Alien Property Custodian can charge against Plaintiffs upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property; and

D. The defendants having deducted the full amount of all expenses directly attributable to the money and property of Plaintiffs and having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of Plaintiffs' money and property, the Custodian has no right to deduct and withhold any additional amount whatsoever on account of his so-called "administrative expenses."

Argument.

This case, as we see it, now presents a clear-cut and rather narrow question of statutory construction, interpreted in the light of the constitutional limitations upon the taking of private property imposed by the Fifth Amendment.

The Alien Property Custodian asserts the right to take two per centum of the money and property admittedly belonging to Plaintiffs to be used by him toward maintaining and operating his office. As he is an official of the United States who seized Plaintiffs' property, not with their consent, but forcibly by virtue of authority conferred upon him by statute, he cannot assert any claim to compensation for services rendered, such as a trustee of a private trust is entitled to claim, but must find some express and valid statutory provision which clearly justifies this taking.

U. S. v. *Shields,* 153 U. S. 88, 91;
U. S. v. *Van Duzee,* 185 U. S. 278, 281;
Stetler v. *McFarlane,* 230 N. Y. 400, 408;
Campbell v. *Cothran,* 56 N. Y. 279, 281;
Crofut v. *Brandt,* 58 N. Y. 106.

This, it is claimed, is to be found in the Trading with the Enemy Act, and particularly in Sections 12 and 24, and in certain executive orders issued by the President in 1918. Section 12 as amended by the Act of March 28, 1918 (Chap. 28, 40 Stat. 460) gave to the Custodian acting under the supervision of the President practically unlimited power of management and disposition (*U. S.* v. *Chemical Foundation*, 272 U. S. 1) and Section 24 added to the original act by the Winslow Bill, approved March 4, 1923 (Chap. 285, 42 Stat. 1516), authorized the Custodian to pay out of seized money and property taxes assessed against it and necessary expenses incurred in respect of it, even though suit for the property might be pending. These sections we discuss presently.

Our view, however, is that the question here involved is governed by Section 9 alone. This section provided that property and money sued for under that section must be held in the custody of the Custodian or the Treasurer of the United States, as the case may be, until termination of the suit, and if that be in favor of the claimant, forthwith paid and delivered over to him. It was upon the strength of this provision that the summary power of executive seizure upon mere suspicion of enemy ownership was upheld by this Court. (*Central Union Trust Company* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Company* v. *Miller*, 262 U. S. 51.)

The property of these Plaintiffs having been seized upon the pledge of that statute that it would be returned if found not subject to seizure, it was beyond the power of Congress in 1923, after the war was over and seizures ended, to revoke that pledge and authorize the Custodian in the face of the pending suit to pay out or dispose of any part of the money or property sued for. The attempt to make Sec-

tion 24 apply to property the subject matter of a suit which contested the rightfulness of the seizure, must be held in violation of the Constitution and that provision of this section must be held void. For the same reasons Section 12 and the executive orders of 1918 must be held to apply only to money and property the seizure of which was not contested. The requirements of "due process" seems to us to make this view of the situation incontestable; nevertheless, as we are unable to find in the statutory provisions relied upon by Defendants anything which justifies the appropriation by the Custodian to his own uses of an arbitrarily fixed percentage of their money and property, we will discuss first Section 24 and the allied provisions of the statute, and then Section 9 and our reasons for contending that that section alone applies in this case.

I.

The Trading With the Enemy Act does not purport to authorize the alien property Custodian to create an expense fund by levying assessments upon money and property seized by him: but if it does, such assessments must be levied upon only enemy property rightfully seized to avoid unconstitutionality.

Section 24 reads as follows:

> "The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money

or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act" (Sec. 24 of the Trading with the Enemy Act; added by Act of March 4, 1923; 42 Stat. 1516).

The provision as to the payment of taxes is a re-enactment with some amplification of a provision contained in the Appropriation Act of July 1, 1918. (C. 113, Sec. 1, 40 Stat. 646). The rest of the Section is new. These provisions are amendatory, indicating a change in the existing law, and obviously are designed to be a complete statement of the powers of the Custodian in the respects mentioned, indicating the limits as well as the existence of the powers.

It is to be noted:

FIRST: That all of the payments authorized to be made must be such as are *necessary;* and

SECOND: That every payment which the Custodian is authorized to make is one directly connected with and chargeable against the particular property involved.

(a) *Taxes.* They are such as are "assessed against" the particular fund—such as are necessarily payable therefrom.

(b) *"Expenses" of "Securing Possession".* It is true that Congress here sanctions a charge which does not bene-

fit the non-enemy owner of the property who subsequently establishes his claim to it. The expense is, none the less, one directly connected with the particular fund, as distinguished from any other fund whatsoever. The expense of "collection" or "control" of the property is of the same character.

(c) *Expense of "Protecting" or "Administering" the Property.* Again, the "expense" indicated is obviously one directly connected with the particular fund, as distinguished from any other. Both the language used and the context make this clear. If there were any ambiguity —and there is not—the doctrine *noscitur a sociis* would determine the case.

THIRD: That the statute all the way through uses the words "to pay" and "shall be paid out of", thus indicating that what it contemplates is actual disbursements attributable to the money or property involved, as opposed to the fixed or regular costs of maintaining the Custodian's office.

The first half of this section very clearly and definitely limits the payments or expenses which can be charged against property to such as are attributable directly to the money or property involved, but if there be any doubt, the last half of the section removes it. This provides specifically that the taxes and expenses shall be paid *out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred.* There is one exception, but this exception emphasizes the limitation. If the money or other property against which the taxes are assessed, or in respect of which the expenses were incurred, is insufficient to permit payment, then—and by necessary implication only then—can the taxes or ex

penses be paid out of other money or property, and even then *only* out of money or property *held for the same person.*

We have, therefore, a direct express statutory mandate to the Custodian that in so far as concerns taxes and such expenses as can be charged against the money and property in his custody, each item of money and property is to be treated as a separate unit, and that payments on account of one item of money or property cannot be charged against or taken out of any other money or property; except only to this extent: that if the money or property in question is insufficient, the deficit may be paid, not out of other money and property generally, *but only out of other money or property belonging to the same person.* These provisions, which grant the right, necessarily define its limits and very clearly deny to the Custodian the right of charging against the money and property of these plaintiffs anything except taxes lawfully assessed against it and the actual amount of *"necessary expenses" incurred in respect of this very money and property.*

These provisions seem to us very plainly to exclude any part of the general expenses of operating the Custodian's office. Such expenses are necessitated by and therefore are attributable to the administration of the office as a whole and not to any particular item or items of money or property; and necessarily they include many items of expense beyond those things mentioned in the statute. However, if the statute does contemplate that any part of the salaries of employees, rents and other fixed expenses should be charged against the different items of money and property held, it was incumbent upon the Custodian to keep reasonably complete and accurate records of the actual amount of

such expenses so that they might be paid only "out of the money or other property in respect of which such expenses are incurred," as the statute in unmistakable language makes mandatory.

We have no quarrel with the political theory that the cost of administering the Alien Property Custodian's office should be paid out of *enemy* property which was rightfully seized; nor are we called upon in this case to discuss the political advisability of delegating to the Alien Property Custodian the power of writing his own appropriation bills by giving to him the power to take for administrative purposes from property in his custody whatever amount he may, in his uncontrolled discretion, see fit to take. As a matter of practical administration, the policy of apportioning the amount to be deducted among the owners of the seized property, according to the value of the property and the amount of money held, has much in its favor; *and in so far as this is limited to enemy property that was properly seized, Congress unquestionably and undeniably has the power so to authorize and direct.*

If, however, it had been intended by this statute to make such provision; if Congress had intended to authorize and direct the Alien Property Custodian to assess the total cost of administering his office against all the money and property seized by him in proportion to the amount or value of such money and property, it would have been a very simple matter to have so directed. This statute clearly directs an entirely different procedure. It does not refer to or discuss the cost of administering the Custodian's office, but only *expenses necessarily incurred in respect of the particular money and property in question;* and expressly directs that each item of money and prop-

erty be charged only with the actual expenses incurred in respect of that particular money and property.

As we endeavor to show presently, this statute authorizes certain kinds of expenses to be charged against property which we believe under no theory can be charged against property wrongfully seized; but irrespective of what kinds or items of expense the statute contemplates, it clearly specifies that each item of money and property shall be charged only with its own expenses and not with any part of the expense incurred in respect of other money and property. This, we think, must negative the Custodian's contention.

It is quite true that trustees' fees, lawyers' fees, insurance premiums and many other charges often are measured in whole or in part by the value of the property in respect of which the services have been rendered or the charges made. These cases are in no way analogous to the present situation. In such cases it is the benefit to the property or to the owner of the property, and not the actual cost of the service, which justifies the measuring of the charge by the value of the property. Such charges almost of necessity include an element of compensation or profit. The Custodian under no theory of law or of justice can make a profit out of non-enemy property wrongfully seized.

The distinction between "actual expenses" and "a reasonable charge" is clearcut and definite. The statute, as we have pointed out, uses the words "necessary expenses".

The expenses or costs of protecting or administering money and property are not and cannot be measured by the amount or value of the property. This seems to us to be one of those self-evident truths of which a Court will take judicial notice.

Defendants rely upon certain executive orders issued by the President as well as upon the provisions of Section 24, and assert that under these orders there was set up the practice of creating an expense fund by assessment upon money and property that had been seized by the Custodian. It seems to us unnecessary to discuss these orders in detail. Their plain language, like that of Section 24, clearly is insufficient to sanction any such practice, and when Congress attempted to legislate upon this very point, the statute necessarily superseded any orders of the President.

In addition, Defendants have cited a provision in the Appropriation Act for the fiscal year ending June 30, 1929, approved May 16, 1928, which provided that all expenses of the office of the Alien Property Custodian "shall be paid from interest and collections on trust funds and other property under the control of such Custodian" (Chap. 580, 45 Stat. 573-574). We are at a loss to understand how this Act, passed after final decree ordering return to Plaintiffs of their money and property, can have any bearing on this case; but, if it permits of any deduction, it would seem to us to be that Section 24 of the Trading with the Enemy Act did not sanction the practice which the Custodian had set up. If it did, why was this additional legislation necessary?

We submit, therefore, that the statute construed according to the natural meaning of the words used, clearly limits the deductions for expenses to such amounts as necessarily were incurred in respect of the money or property against which such expenses are charged; and even if any part of the salaries, rents and other general expenses of the Custodian's office come within the purview of these provisions, certainly only such identifiable or determinable items as were attributable to the money and property in question can be so charged. If this be the correct construction of the

statute, it must negative the Custodian's contention that he was authorized to create an expense fund by general levy upon all money and property held, but if the statute does purport to authorize such assessments, it must be held unconstitutional or else restricted in operation to enemy property rightfully seized. This seems to us clear upon several fundamental grounds.

In the first place, Section 24 and the Executive Orders as well specify several kinds of expenses which seem to us clearly not chargeable against property wrongfully or mistakenly seized.

A. *Expenses incurred in securing possession, or collection, or control.*

Unless the property is held adversely to both the real owner and the Custodian, there seems to us neither reason nor justice in charging such expenses against the owner from whom the Custodian takes the property by force. The Custodian's seizure of plaintiffs' property was made solely in the interest of and for the benefit of the United States. Such seizure was not necessary for the protection of the property nor was it made for that purpose. It was not made in the interest of the owner, but in hostility to him and in derogation of his rights.

In the case of *Gillespie* v. *Piles & Co.*, the Circuit Court of Appeals for the Eighth Circuit refused to tax such expenses against successful claimants of property reclaimed from a Receiver in Bankruptcy, saying:

> "There is manifest injustice and inequity in taking out of a fund or property in the custody of a Court compensation for the services of an attorney or for the service of any other party by means of which the fund or property has been taken or kept

> from its true owner. The latter ought not to be required to pay for services which have been a positive detriment to him. And courts of equity may not lawfully take out of a fund or property in its custody and pay compensation for the services of an attorney of a trustee or for services of any other party by means of which the fund or property has been taken or detained from its equitable owner" (178 Fed. 886, 892).

This Court, itself, uses similar language in the case of *Hobbs* v. *McLean, et al.*, saying:

> "As in our view the fund belongs to the plaintiffs in this suit, all that comes out of it for the compensation of the defendant comes out of their pockets. We see no reason why they should pay the defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which the defendant seeks pay from the plaintiffs were not rendered in their behalf, but in hostility to their interests" (117 U. S. 567, 581).

We concede the inevitability of some mistakes in the war-time rush of attempted capture of all enemy property, but this does not justify making the innocent victims of the Custodian's mistake bear the expense incurred by the Custodian in making that mistake and in taking from them their property which, as was afterwards proven, should not have been taken from them. Such expenses are a part of the cost of the war, to be borne as all other costs of the war. To make these plaintiffs pay such expense as a condition to getting back their property amounts to taking their property for public use without any compensation, much less just compensation. The remedy of Section 9 becomes far

from adequate if return of property under that section is subjected to any such undue burden as the payment of these expenses.

B. *Expenses incurred in protecting property.*

The Custodian under this clause has asserted the right to charge against property expenses incurred not only by the Custodian's office but by the Department of Justice as well, in resisting suit of the owner to recover the property wrongfully seized. (See Custodian's Statement of Account, R. pp. 74-75.)

What is said above as to expenses incurred in taking the property from the custody of the true owner applies with like force to expenses incurred in attempting to keep that owner from getting back his property. The Circuit Court of Appeals for the Ninth Circuit in the case of *Vowinckle* v. *Sutherland*, 24 Fed. (2nd) 196, has held that this cannot be done; that if such deductions were allowed the remedy of Section 9 would not be complete and adequate; and that to permit such deduction would work a grave injustice.

In addition there are necessarily numerous other items of expense incidental to the administration of a governmental agency such as the Custodian's office, no part of which for similar reasons can be charged against money or property ordered returned to the true owner. The Custodian, however, asserts the right to assess the total costs or expenses of his office against all of the money and property held, enemy and non-enemy alike. Conceding—which, however, most emphatically we do not—that it is proper to apportion the aggregate of general expenses according to the value of the property held, the non-enemy property can not be assessed with a proportionate part of the total

expenses, but only with its proportionate part of such expenses as properly may be charged against property mistakenly or wrongfully seized. If the assessment is levied at a rate sufficient to meet the total expenses of the office, is not the amount charged against the non-enemy property necessarily excessive? It seems to us this must be so.

If the Custodian is required upon accounting to submit an itemized statement of the disbursements or expenses which he seeks to charge against the property ordered returned, the proper items or amounts may be allowed and the improper items or amounts disallowed as in the case of any other accounting; and both the Government and the property owner receive what each justly and constitutionally is entitled to receive. The position of the Custodian, however, is that no such statement can be required of him, nor can he be questioned in any way either by the owner or by the Court with reference to the expenses he seeks to charge against the successful plaintiffs. In the brief filed in this Court in opposition to Petition for Certiorari, it is said at page 12:

> "The determination of the amount of administrative expense to be charged each estate, delegated by the President to the Custodian, should be final, unless clearly unreasonable. Must each successful claimant be given the right to inspect all of the books of account of the Custodian over a period of ten years, to cross-examine Custodians, past and present, as to their accounts, and to require the Court to apportion expenses between the different trusts?"

There is nothing in the statute which refers to a reasonable charge, the statutory words being "necessary expenses"; and we know of no rule or principle of law

which would authorize the Custodian to assess the property with a reasonable charge; but even if a reasonable charge be the measure of the deduction, how or in what way, except by inspection of the Custodian's books of account, and examination and perhaps cross-examination of the Custodians, past and present, can the Court determine whether the charge is reasonable or unreasonable? How else can it be determined whether the Custodian's office has been administered extravagantly or economically, and whether Plaintiffs' property has been safeguarded and properly taken care of, or wasted or squandered? How else can it be determined whether the Custodian in making his assessment has included or taken into consideration or account items of expense and services which had no relation whatever to Plaintiffs' property, or which could not properly be charged against Plaintiffs?

We know of no valid reasons why these books should not be subject to proper inspection, and the Custodians to proper cross-examination in the Court of Equity in which the Custodian is accounting; and certainly if the Custodian seeks to take any part of the money of these Plaintiffs under the guise of expenses incurred by him, he must justify his demand by his books and records and by his testimony if necessary, otherwise his appropriation of this money becomes a purely arbitrary act.

So far as this case is concerned, however, we believe the Custodian's fear that his books may be examined and he and his predecessors cross-examined, is unnecessary. It has been admitted, as we have already pointed out, that the sum here withheld is an assessment of two per centum levied against Plaintiff's property upon the theory that the Custodian can assess property in his custody at a rate

which will "aggregate an amount sufficient to cover his administrative expenses". (See brief in opposition to certiorari, p. 9; supplemental memorandum, pp. 2-3.) In other words, what the Custodian asserts the right to do is to tax the property in his custody at such a rate as will produce an expense fund sufficient to operate his office and maintain his organization in the way he may think it should be run. Even if it be conceded that the Custodian could be given the power of levying special assessments or taxes against private property not subject to capture, he still could not levy such assessments arbitrarily and without notice to the owner, and without any procedure whereby his assessment could be reviewed and corrected if found erroneous.

Stuart v. *Palmer*, 74 N. Y. 183, 189, 191-193, 194;
Cent. of Ga. Ry. v. *Wright*, 207 U. S. 127, 142.

II.

The bringing of plaintiffs' suit under Section 9 of the Trading With the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Alien Property Custodian can charge against plaintiffs upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property.

At the outset of this argument we stated our view to be that the question presented here is governed by Section 9 and Section 9 alone. This section has provided continuously from the original enactment of the Trading with the Enemy Act:—

"If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." (40 Stat. 419; 41 Stat. 35; 41 Stat. 977; 41 Stat. 1147; 42 Stat. 351; 42 Stat. 1065; 42 Stat. 1511; 44 Stat. 406; 45 Stat.....)

It was upon the strength of this provision of the statute that the power of summary seizure of property merely supposed to be enemy property was sustained. In the first case to come before this Court (*Central Union Trust Company* v. *Garvan*) Mr. Jutice Holmes in discussing this provision says:

"To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession,—that the property is to be conveyed to him; and that by, the Act of March 28, 1918, chap. 28, 40 Stat. at L. 459, 460, enlarging §12, the Custodian 'shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed,' etc., to him, and is given the power to sell and manage the same as though he were absolute owner. *All this may be conceded if no claim is filed.* But this act did not repeal §9, which is amended by the

> later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing, but the preliminary custody, such as would have been gained by seizure. *It attaches the property to make sure that it is forthcoming if finally condemned, and does no more.* (Italics ours.) (254 U. S. 554, 569.)

In the case of *Stoehr* v. *Wallace, supra,* Mr. Justice Van Devanter in discussing this same contitutional question says:

> "There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but, pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result, and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation ir pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious." (255 U. S. 239, 245-246.)

In the case of *Commercial Trust Company* v. *Miller, supra,* Mr. Justice McKenna, in summarizing the statute, says:

> "In other words, and in comprehensive description, the act may be denominated an exercise of governmental power in the emergency of war, and its procedure is accommodated to and made adequate to its purpose, but securing, as well, the assertion of opposing or countervailing rights 'by a suit in equity, unembarrassed by the President's executive determination;' and, if the claimant 'prevails,' the property 'is to be forthwith returned to him.'" (262 U. S. 51, 53).

These decisions assume that the money and property sued for and every penny and parcel of it will be held until the suit is terminated, and upon no other basis can the remedy of Section 9 to be held adequate.

If, while the suit is pending, the money can be paid out or the property otherwise disposed of without notice to the claimant, and without order of Court, of what benefit is it to the claimant to obtain a full hearing upon his claim? The money and property certainly could not be forthwith returned to him, and in what way then could the Court enforce the claim?

The record in this case furnishes a concrete illustration of this. The statement submitted by the Custodian (R., pp. 74-75) shows disbursements from the Treasury in the total amount of $881,953.40, in addition to the sum of $55,909.83 withheld as "administrative expenses". Of this amount $150,000 was paid out by virtue of Court decree; but this still leaves approximately $730,000 paid out without notice to Plaintiffs and without order or decree of Court. When these payments were questioned Defendants

merely answered that the moneys had been paid out, and were no longer in their possession, and were out of their control. (Answer to Petition, paragraphs 6 and 7, R., pp. 81-82.)

We submit, therefore, that the provisions of Section 9 must prevail notwithstanding anything contained in any executive order, or in Section 24, or in any other statute that Congress did or could enact; and that the bringing of their suit in equity under Section 9 segregates the money and property which was the subject matter of that suit from the general mass of property held by the Custodian and the Treasurer of the United States, and that thereafter the sole right or power of either of these officials with respect to such money and property was that of holding and safeguarding as an attaching officer, or perhaps as a receiver in equity would do in a civil action.

The money and property which Plaintiffs sued for was their money and property and neither the Alien Property Custodian nor the United States had any right or title to it, and the Alien Property Custodian did not have and could not be given any power of disposing of the property without notice to the owners and without an order of the Court which acquired full jurisdiction over the property by the bringing of the suit. If any payments became necessary while the suit was pending the rights both of the Government and the Plaintiffs could have been protected by application to the Court on notice, which, under its general powers as well as the express authority conferred by Section 17 of the Trading with the Enemy Act, could have authorized whatever steps might be required for protection or preservation of the property which was the subject matter of the suit. The situation was substantially the same as it

would have been had the United States instituted proceedings as by a libel of information seeking condemnation of the property and confiscation as prize of war. In such proceeding custody of the property would be taken by the United States Marshal and thereafter would be held by him; but otherwise we can see no substantial difference in the situation which would result. Without an order of the Court the Marshal would have no right to sell the property nor appropriate any part of it to the expenses of his office, nor make any other disposition which would render it impossible for him to comply with the decree of the Court ordering its return to the successful claimant.

The constitutional question involved is that of "due process". Private property cannot be taken from its owner except by some procedure which guarantees to the owner his day in Court. Attachment or preliminary seizure, in the nature of attachment, can be made without notice and a hearing; but the property cannot be taken away finally from its owner without a hearing, and this means a real hearing—not a mere empty form. But of what protection to the owner is a suit when a judgment for return of his property produces not his property but merely a statement that the property has been disposed of?

That such a remedy does not satisfy the requirements of due process has been decided by this Court in several cases.

McVeigh v. *United States,* 11 Wall. 259;
Windsor v. *McVeigh,* 93 U. S. 274;
Hovey v. *Elliott,* 167 U. S. 409;
Roller v. *Holly,* 176 U. S. 398;
Ochoa v. *Hernandez, etc.,* 230 U. S. 139;
Coe v. *Armour Fertilizer Works,* 237 U. S. 413.

The case of *Windsor* v. *McVeigh, supra,* seems to us particularly in point and the language and reasoning of the opinion of Mr. Justice Field is particularly apt to this case. That case was an action of ejectment which involved the validity of a decree of confiscation entered in a proceeding under the Confiscation Act of 1862 (12 Stat. 589). In that proceeding, the answer of the owner was stricken upon the ground that he was an enemy and judgment of condemnation was entered by default. That proceeding was held wholly void because in violation of the constitutional injunction against taking of property without due process. In discussing the essential requirements of due process, the opinion says that the requirement of notice "is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made;" and that "a denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether" (pp. 277-278). The opinion further speaks of such proceedings as "a mere arbitrary edict" and as "mere mockeries and as in no just sense judicial proceedings" (pp. 278, 281).

In the case of *Hovey* v. *Elliott, supra,* Mr. Justice White, in discussing due process and after referring to the McVeigh cases with approval, says: "If the legislative department of the government were to enact a statute conferring the right to condemn a citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution?" (p. 417). The right to be heard, however, means the right to be heard effectively. If, while the citizen is being heard, his property can be disposed of and when the Court orders its return to him the official in whose custody

it was can satisfy the judgment by merely answering that the property no longer is in his custody, the right to sue becomes, as Mr. Justice Field says, a mockery, and the sham and deceptive proceeding had better be omitted altogether. With Mr. Justice Field, we say that it is difficult to speak of such proceedings with moderation.

If we look to the law of attachment as precedent we find the rule to be that an attaching officer in case the attachment is vacated can collect neither fees nor expenses out of the property attached, and that his sole recourse is against the unsuccessful party at whose instance the attachment was issued. This has been held even in the face of statutes expressly authorizing the sheriff to collect out of the money attached or levied upon, and purporting to authorize him to refuse return to the owner until his fees and expenses have been paid.

Read v. *Williams,* 95 Ga. 103, 106-107;
Summerton Live Stock Co. v. *Cleveland Mfg. Co.,* 114 S. C. 186, 190-191;
Commonwealth Finance Corp. v. *Mo. Motor Bus Co., et al.* (Mo., 1923), 252 S. W. 372, 375 (not otherwise reported);
Bowe v. *U. S. Reflector Co.,* 36 Hun (N. Y.) 407;
Union Distilling Co. v. *Union Pharmaceutical Co.,* 56 N. Y. Superior 417;
French v. *Bankverein Suisse,* 179 App. Div. (N. Y.) 371, 372.

In the case of *Read* v. *Williams, supra,* the Court says:

"To say that a plaintiff, by simply commencing an action and putting in motion the expensive machinery of a court, can commit the estate of a

> defendant to the payment of such expenses or such costs as may be incurred, without a final judgment finding him in any sense an offender, *is a confiscation pure and simple, and abhorrent to every principle of justice and right.*" 95 Ga. 107.

In the case of *Bowe* v. *U. S. Reflector Co., supra*, the Court, after referring to the fact that the attachment was not issued at the instance or under the authority of the owner, but at the instance and upon the application of the adverse parties, and that by virtue of the attachment the owner of the attached property entered into no obligation or duty to pay costs, charges or expenses, said:

> "To permit the sheriff to hold it now, after the attachment has been set aside, until his costs, charges and expenses have been paid, and sell it for their payment, would be to allow him to hold and dispose of the property of one party to pay the debt exclusively of another." 36 Hun 409.

In the case of *Union Distilling Company* v. *Union Pharmaceutical Company, supra*, the Court discusses the provision of the New York Code that purported to give the sheriff the right to hold property until his fees were paid even when the attachment had been vacated, and said:

> "But as the counsel shows, the exaction of the section, that a person's property shall not be delivered to him until he pays fees for which he has no personal liability, is unconstitutional and therefore inoperative." 56 N. Y. Super. 422.

In another New York case (*Weston* v. *Watts*, 45 Hun 219), which, however, arose out of a receivership and not an attachment, the Court refused to tax the expenses of

the receiver against the property held by the receiver, saying:

> "It is sufficiently injurious for a person to have his property taken from him, or his person subjected to arrest, without right; and upon no legal principle can the wrong be aggravated in such a manner as to order him to pay the expenses of the proceeding.
> • • •
> The fundamental law of the State will not permit that to be done, for it has been provided by Section 6 of article 1 of the Constitution of the State, that no person shall be deprived of life, liberty or property without due process of law. And a legal proceeding by which he may be divested of his property which is unauthorized, and afterwards set aside, cannot be such due process. The law cannot sanction the taking of one man's property, in this manner and subjecting it to the expenses or obligations of another" (45 Hun 221).

This is the general rule in Equity where a receivership has been vacated.

People, etc. v. *Jones,* 33 Mich. 303;
State v. *Peoples U. S. Bank,* 197 Mo. 605, 612-615;
Ephraim v. *Pacific Bank,* 129 Cal. 589, 592-594;
Hendrie v. *Parry,* 37 Colo. 359, 365;
Moyers v. *Coiner,* 22 Fla. 422;
Link Belt v. *Hughes,* 185 Ill. 413, 417-418;
O'Mahoney v. *Belmont,* 62 N. Y. 133;
Hernandez, et al. v. *Brookdale Mills, Inc.,* 232 N. Y. 552;
Harrington v. *Union Oil Co.,* 144 Fed. 235;
Lion Bonding & Surety Co. v. *Karatz,* 262 U. S. 640;
Burnrite Coal Briquette Co. v. *Riggs,* 274 U. S. 208;

It is also the rule in bankruptcy.

In re Chas. W. Aschenbach Co., 183 Fed. 305;
Beach v. *Macon Grocery Co.*, 125 Fed. 513, 514-517;
In Re Lacov, 142 Fed. 960, 961-962;
Gillespie v. *Piles & Co.*, 178 Fed. 886, 892;
In Re Wentworth Lunch Co., 191 Fed. 821.

We do not contend here for the application of the rule of attachment in all its strictness. As stated at the outset of this brief, we concede the right of the Alien Property Custodian to charge against this property all disbursements or expenditures necessarily made for the purpose of protecting and taking care of their money and property; such in general as they themselves would have had to pay if in possession of the property. No such items are now involved in this case. This would not include any part of the rent, salaries or other fixed expenses—commonly referred to as overhead—of maintaining the Custodian's office and organization. These expenses are not attributable to the money and property involved; they are not such as the owner himself would have had to pay. They are extra expenses made necessary by and attributable to the mistake of the Alien Property Custodian in seizing property that should not have been seized.

The defendants cite the case of *Henkels* v. *Sutherland* (271 U. S. 298). This case appears to us to be beside the point. It was dealing only with earnings made by the Treasurer upon cash covered into the Treasury by the Custodian, while here we are dealing with principal; the two per cent. deducted by the Custodian having been taken entirely out of the principal. Aside from this and more

fundamentally, that case simply holds that the owners of this money paid into the Treasury while entitled to earnings upon the money, were entitled only to the net earnings, that is, to the balance after the necessary actual expenses of the Treasurer in earning these profits had been deducted. This is quite a different thing from holding that the Alien Property Custodian can deduct a part of the principal, much less an arbitrary sum which bears no relation whatever to the cost of managing or taking care of that principal.

The case of *Trustees* v. *Greenough*, 105 U. S. 527, is similar. In that case a mortgage bondholder performed services over a period of years which resulted in saving the property from waste and recovering large sums which inured not only to his benefit but to the holders of other bonds. This Court held that the fund could be charged with the costs of the litigation and with counsel fees and expenses upon the principle that the creditors of the corporation as a whole were entitled not to the gross amount recovered but only to net. In this very case, however, the Court limited the charges to actual disbursements and refused to allow anything additional to cover the private expenses of or compensation to the bondholder, but for whose active intervention the recover would not have been had.

This Court itself, in the case of *Hobbs* v. *McLean, supra,* notes the difference between a situation such as is presented in *Trustees* v. *Greenough,* and that presented here, saying:

> "But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our

> notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate". (117 U. S. 582.)

The case of *Haycraft* v. *U. S.*, 22 Wall. 81, is another cited case which is not in point. This involved so-called "Captured and Abandoned Property" seized by the army in the zone of military operations. The property when seized was converted into cash and the proceeds deposited in the Treasury of the United States. The decision in that case was simply that claimants suing under a special statute could recover only the net cash that had been covered into the Treasury. In other words, that the United States was liable only for what it actually had received. This falls far short of sustaining the right of the United States to withhold a part of the precise money and property identified as the property of Plaintiffs.

Defendants fail to cite the only case arising out of seizures under the Captured and Abandoned Property Act, which is a precedent for this case; that is the case of *Steamer Saratoga* v. *438 Bales of Cotton* (1 Woods, 75). In that case the owner was suing for his cotton before it had been sold. His claim was established but it was attempted to charge the cotton with cost of transportation and storage. The Court refused to allow such charges.

Defendants have not cited a single decision nor any rule or principle or precedent in support of the position taken for the first time in this Court, that no matter upon what basis or for what reason the $55,909.83 was withheld, plaintiffs cannot object or complain unless they can show that the amount withheld is unreasonable. The answer makes no contention or claim that the sum deducted was

reasonable, and no testimony or evidence of any kind upon any such question was taken. This Court has held that to enter judgment upon a matter not within the record and not in fact litigated, is prohibited by the Constitution because it amounts to depriving a person of property without due process.

> *Reynolds* v. *Stockton,* 140 U. S. 254, 268, 269;
> *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 426.

But, conceding that the Custodian could deduct "a reasonable charge," by what measure or yardstick is the amount of money which will constitute such a charge to be determined? In the argument for Defendants reference is made to the usual charges of trustees. For reasons already pointed out this is not a proper standard of comparison. We know of no basis other than the actual amount of necessary expenses for determining what is a reasonable charge in a situation such as this.

III.

The defendants having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of plaintiffs' money and property, the Custodian has no right to deduct and withhold any amount whatsoever on account of his so-called "administrative expenses".

This discussion brings us back to the point from which we started. The Alien Property Custodian claims the right to charge against the property of these Plaintiffs part of the general or fixed expenses, that is, overhead, of his

office. This is in addition to all of the disbursements which he can identify as being directly attributable to this money and property. The further deduction of $55,909.83 was and is contested upon the ground that it is merely an arbitrary appropriation of Plaintiffs' money to be used for the maintenance of a governmental agency—the Alien Property Custodian's office. The Custodian admits that this sum represents no disbursements or identifiable or determinable expenses incurred in respect of their money and property, but is simply an assessment of two per centum levied upon all property held, enemy and non-enemy alike. He attempts to justify such assessment against the property of these Plaintiffs upon the ground that this property should bear some part of the general expenses of his office, and because the exact amount attributable to such property has not been recorded or cannot be determined, the Custodian claims that he can charge whatever amount he may decide to take. We do not see how this can be anything but an arbitrary taking of private property prohibited by the Constitution.

We submit, therefore, that the decree of the Court of Appeals should be reversed, and that of the Supreme Court of the District of Columbia affirmed.

Respectfully submitted,

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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE TREASURER OF THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 365

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. Robert Sigg-Fehr, deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, petitioners

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED States, and Howard Sutherland, as Alien Property Custodian

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE TREASURER OF THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (not yet reported) will be found at page 66 of the Record. The Supreme Court of the District of Columbia decided in favor of the petitioners without opinion. (R. 60.)

JURISDICTION

The decree sought to be reviewed was entered by the Court of Appeals of the District of Columbia on June 3, 1929. (R. 72.) The petition for writ of certiorari was filed August 31, 1929.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Alien Property Custodian was constitutionally authorized to deduct, from the proceeds of property seized as enemy property but later held to belong to neutrals, $55,909.83 as expenses for administering the property for about 10 years, the amount deducted being two per cent of the amount of the property returned to the owners.

STATUTE INVOLVED

The pertinent statute involved is Section 24 of the Trading with the Enemy Act, approved March 4, 1923, c. 285, 42 Stat. 1511, 1516, which reads as follows:

> The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or

control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

EXECUTIVE ORDERS

The Executive Order issued by the President on February 26, 1918 (No. 2813), provided in part that—

(a) The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the "Trading with the Enemy Act" and the Executive orders, rules, and regulations heretofore, hereby, or hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees and attorneys in fact and fix the penalty and conditions thereof.

(b) The Alien Property Custodian may pay all reasonable and proper expenses

> which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.
>
> * * * * *

The Executive Order of July 16, 1918 (No. 2916), specifically authorized and empowered the Alien Property Custodian—

> to determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depositary for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic * * *.

STATEMENT

The suit out of which the instant controversy arises was filed in the Supreme Court of the District of Columbia on December 8, 1921. (R. 1.) After protracted proceedings it was adjudged that the plaintiffs were citizens of Switzerland and residents

of Zurich and as such were entitled to recover proceeds of the sale of certain shares of stock and bonds (together with accrued dividends and earnings on the proceeds) which were seized by the Alien Property Custodian during the war as property of a German corporation. The decree, entered January 19, 1928, ordered the Alien Property Custodian and the Treasurer of the United States to deliver the property to the plaintiffs (R. 47)—

> after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the trading with the enemy act and amendments thereto.

No objection to this decree was made by either party, but after a payment had been made in which the Alien Property Custodian deducted $55,909.83 as administrative expenses, the plaintiffs filed a petition for a rule directing the defendants to show cause why they should not also pay this sum to the plaintiffs. (R. 50.) The defendants filed a motion to discharge the rule to show cause, and in their answer alleged that the Custodian (R. 58)—

> deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian are paid.

The plaintiffs then moved to strike this answer from the record on the ground that it was insufficient to justify the admitted refusal to pay the plaintiffs the sum in question and certain other sums not involved in the instant petition. (R. 59.) The Supreme Court of the District, after argument, entered an order adjudging the retention of the same "unlawful and without right" and ordering the defendants to pay the same to the plaintiffs. (R. 60.) On appeal, the Court of Appeals of the District of Columbia reversed this order and remanded the cause for further proceedings not inconsistent with its opinion. (R. 72.)

ARGUMENT

I

THE ALIEN PROPERTY CUSTODIAN WAS CONSTITUTIONALLY AUTHORIZED TO DEDUCT FROM PROPERTY SEIZED BY HIM A FAIR CHARGE FOR ADMINISTERING IT

On page 5 of their brief in the Court of Appeals these petitioners said:

> We have not contested and do not here contest the right of the Custodian to deduct from plaintiffs' money all disbursements or expenditures necessarily made for the purpose of protecting or administering the money and property of the appellees, and which are directly attributable to such money or property.

They now contend that "as a question of statute and constitutional right" it was improper to make a deduction of "one cent more than the actual expense of protecting or administering such property" and state that the utmost that can be charged against such property "is *actual cost* of administration". (Brief of petitioners, pp. 14, 25.)

The power of Congress to authorize the seizure of property *supposed to belong to an enemy,* even before an adjudication that it was enemy property, has been upheld by this Court. *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239. The latter case held that the Trading with the Enemy Act, which provides for such seizure, does not violate the Fifth Amendment, but is sanctioned by Article 1, Section 8, Clause 11, of the Constitution, which empowers Congress—

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

This Court has also recognized that under the Act of November 4, 1918, c. 201, 40 Stat. 1020, all property seized should be administered by the Alien Property Custodian and that by the Act of March 28, 1918, c. 28, 40 Stat. 459 (providing that the Custodian should be "vested with all of the powers of a common-law trustee in respect of all property"), he is given the power to "manage the same as though he were absolute owner." *Central Trust Co.* v. *Garvan,* 254 U. S. at page 569, *supra.*

Owing to the magnitude of the task it was, of course, impossible for the President or the Alien Property Custodian (to whom he delegated his authority) to handle alone the administration of the trusts thus imposed upon him; and Congress authorized the President to employ clerks, attorneys, accountants and other necessary employees for administration of the Act. (Section 6 of Trading with the Enemy Act, c. 106, 40 Stat. 411, 415.) The power vested in the President by this section was delegated to the Alien Property Custodian by the Executive Order of October 29, 1917. An Executive Order of February 26, 1918, issued by the President, authorized the Alien Property Custodian to prescribe the duties and compensation of agents, and also authorized him to pay proper expenses, including the expense of "administering" the property, and, as far as possible, to pay such expenses out of the estate administered. An Executive Order of July 16, 1918, authorized the Custodian to "*determine* and pay out all reasonable and proper expenses incurred in or about or with respect of the exercise of any powers vested" in him. (Italics ours.)

This construction of the statute by the President, who was charged with the duty of enforcing it, should not be overruled unless such construction is clearly erroneous. *United States* v. *Moore,* 95 U. S. 760; *Brown* v. *United States,* 113 U. S. 568; *United States* v. *Johnston,* 124 U. S. 236; *Pennoyer* v. *McConnaughy,* 140 U. S. 1; *Robertson* v. *Downing,* 127 U. S. 607, 613.

The practice of deducting from the several trusts administered by the Custodian certain percentages which aggregate an amount sufficient to cover his administrative expenses has been in force since the promulgation of the Executive Order of February 26, 1918, *supra.* This practice was known to the Congress prior to the enactment of the Act of March 4, 1923, *supra.* Therefore the legislative authority given the Custodian by the Act of March 4, 1923, "to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same," would seem to be a statutory confirmation of the practice theretofore existing and an implied endorsement by Congress of the existing practice.

Congress also approved this practice by the Act of May 16, 1928, c. 580, 45 Stat. 573, 574, which provided that all expenses of the Office of the Alien Property Custodian, including his own compensation, should be paid from "interest and collections on trust funds and other properties under the control of such Custodian."

It is, of course, a general principle that a trust estate must bear the expenses of its administration. *Trustees* v. *Greenough,* 105 U. S. 527, 532. In this connection it should be borne in mind that the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, provided, that the Custodian should be "vested with all of the powers of a common-law trustee".

We consequently submit that it was proper for the Custodian to deduct from the funds in question the expenses of administering the fund.

The instant petition states (p. 6):

> The decision of the Court of Appeals by implication conflicts with the decision of the Circuit Court of Appeals for the ninth Circuit in *Vowinckel* v. *Sutherland,* 24 Fed. (2nd) 196 and decisions of this Court in *Central Union Trust Company* v. *Garvan,* 254 U. S. 554; *Stoehr* v. *Wallace,* 255 U. S. 239; *Henkles* v. *Sutherland,* 271 U. S. 298; and *Trustees* v. *Greenough,* 105 U. S. 527.

We submit that these Supreme Court cases, in so far as they bear upon the subject, sustain, rather than conflict with, the decision of the Court of Appeals in the instant case. In *Henkels* v. *Sutherland,* 271 U. S. 298, this Court held that an American citizen whose property had been wrongfully seized by the Alien Property Custodian was entitled to recover the same, together with the accrued income therefrom, "*after deducting proper charges and expenses.*" (Italics ours.) See also *Haycraft* v. *United States,* 22 Wall. 81, 93–94.

In *Vowinckel* v. *Sutherland,* the Circuit Court of Appeals for the Ninth Circuit held that it was improper for the Alien Property Custodian to deduct certain traveling expenses and similar expenses incurred by the Department of Justice in resisting an appeal in a suit brought against the Custodian by a successful claimant. The holding of the

case is that these expenses "were not incurred in protecting or administering" the property. 24 F. (2d) 196, 198. The decision in that case does not conflict with the decision of the Court of Appeals in the instant case, which upheld an entirely different sort of deduction as an expense of administration.

The only question remaining to be considered is whether the deduction does represent a proper expense of administration.

II

THE DEDUCTION OF $55,909.83 IS A PROPER CHARGE FOR EXPENSES OF ADMINISTERING AN ESTATE FOR TEN YEARS, WHERE THE PRINCIPAL AMOUNTED TO OVER $3,000,000 AND THE ACCUMULATED EARNINGS THEREON AGGREGATED OVER $1,000,000.

The real contention of the petitioners seems to be that the Custodian can make no deduction for administrative expenses unless he can show to the cent the amount which the administration of this particular trust actually involved.

If this were so, it would be impossible, as a practical matter, for the Custodian to collect any considerable proportion of the expenses of the administration of the trusts in his charge. The Custodian, of course, was obliged to maintain a large organization to administer the trusts. The same persons undoubtedly attended in the course of each day to the various details of many different trusts, and it was not feasible to apportion any aliquot part

of the salaries of particular persons or other general expenses among the numerous estates handled. If the contention of the petitioners were sound, the provisions for payment of administrative expenses would be futile. The determination of the amount of administrative expense to be charged each estate, delegated by the President to the Custodian, should be final, unless clearly unreasonable. Must each successful claimant be given the right to inspect all of the books of account of the Custodian over a period of ten years, to cross-examine Custodians, past and present, as to their accounts, and to require the court to apportion expenses between the different trusts? We submit that all any successful claimant of seized property can require is that the amount deducted should be a reasonable charge for administering his property. The petitioners, of course, had an opportunity in the courts below to contend that the charge was an unreasonable one for the administration of their property, but they did not make any such contention in the courts below and do not now so contend.

We submit that the deduction made is so small in proportion to the amount of the funds administered that there is no possible ground for contending that it was unreasonable.

The principal of the trust estate originally amounted to over $3,000,000. ($489,000 par value of obligations of the United States and stock worth

over $2,700,000 were seized. R. 53.) The $55,-909.83 deducted is less than two per cent of this amount, and is about five per cent of the income, which averaged over $100,000 annually. The administration of this fund involved arranging for and considering an appraisal of the stock seized, arranging for a sale of it and re-investing of the proceeds, collecting dividends from the stock and the bonds and investing the income regularly, besides other detail incidental to the care of the property. It is obvious that this administration—extending over a period of ten years—must have required a large amount of routine work, as well as oversight requiring discretion and judgment. The percentage charged is much less than would ordinarily be allowed a private trustee for similar services in administering a trust estate of this size.

CONCLUSION

Although, as we have stated, the practice of dededucting for administrative expenses certain percentages of funds wrongfully seized has been in effect for years, and there has been much litigation under the Trading with the Enemy Act, we are aware of no case in which the objection raised in the instant petition has ever been litigated before, and we are informed that it is not raised in any other case which is pending at the present time. The decision of the Court of Appeals is not in conflict with the decision of any other court, and the case pre-

sents no question of general importance. We believe that no substantial ground for the issuance of a writ of certiorari by this Court has been shown and that the petition should be denied.

Respectfully submitted.

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No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1929

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, DECEASED, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS, PETITIONERS

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM IN BEHALF OF RESPONDENTS

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HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, petitioners

v.

WALTER O. WOODS, AS TREASURER OF THE UNITED States, and Howard Sutherland, as Alien Property Custodian

---

SUPPLEMENTAL MEMORANDUM IN BEHALF OF RESPONDENTS

Counsel for the petitioners have called our attention to certain statements in the brief in opposition recently filed in this case which they fear will be misunderstood by this Court. Although we believe that a fair reading of the brief will remove the doubts entertained as to the meaning of these statements, we are filing this supplemental memorandum, at the request of counsel for the petitioners, to make these matters clear beyond possibility of misunderstanding.

1. No testimony was introduced in connection with the hearing on April 2, 1928, at which the court entered the order adjudging the deduction of $55,909.83 "unlawful and without right." (R. 60.) We rely in part on portions of the record of proceedings in the suit in equity which was brought to recover the property which was seized, as it was in this same suit in a proceeding subsequent to the entry of the order directing the payment of proceeds of the property seized that the question as to the sum deducted as administrative expenses arose. We assumed, and still contend, that it is proper for this Court to consider anything appearing in the record filed in this Court. We also rely on exhibits attached to the petition for rule to show cause, and on certain general facts in regard to the administration of the Custodian's office as to which there was no testimony but of which, we contend, this Court must take notice.

2. We did not mean to indicate that there was any testimony showing the exact cost of the administration of petitioners' estate by the Custodian. Our contention is, and was, that it would be impracticable to figure such costs and that it is not feasible to apportion any aliquot part of the salaries of particular persons or other general expenses among the numerous estates handled. (See pages 11–12 of our brief in opposition.) The amount deducted is, as has always been admitted, two per cent of the value of the assets turned over to the petitioners, as

shown in the Custodian's statement of property held in trust and in the receipt signed in behalf of the petitioners. (R. 53, 54.) The amount on which this percentage was figured was $2,795,491.34, of which $2,306,491.34 was cash and $489,000 was the par value of Treasury Notes and Liberty Loan bonds.

3. We do not mean to imply by any statement in our brief that any witness testified that the amount deducted was a proper charge for the administration of this estate. What we do contend is that the facts which appear in the record in regard to the amount of the property and the time for which it was held formed a sufficient basis for the Court of Appeals to decide that the sum deducted was not an unreasonable one for the Custodian to charge as administrative expenses.

4. Counsel for the petitioners have also questioned the correctness of our assertion as to the opportunity which they had in the courts below to contend that the charge was an unreasonable one and as to their failure to make any such contention. Regardless of what was actually done, we still are of the opinion that it would have been open to the petitioners to have argued this matter in detail had they desired to do so and that they did not make any real argument on this point. In order, however, that this Court may judge what the contentions of the petitioners were in the courts below, we give the following quotations from their brief filed in the

Court of Appeals. The following statements appear under the heading "Preliminary Statement":

> An examination of the statement submitted by the Custodian to appellees (see Exhibit A, R. pp. 52–53) discloses that appellees are charged with various items actually disbursed or claimed to have been disbursed from their money. These items represent all of the disbursements or expenses of the Custodian which can be identified as directly attributable to the money and property of the appellees involved in this suit.
>
> * * * * * * * * * In particular, we challenge the assumption which underlies the whole argument on behalf of appellants that the cost or expense of protecting and administering property is determinable by any arbitrary percentage of its value or amount.

Point I of the argument in that brief is made under the following heading:

> THE ANSWER FAILS TO STATE ANY FACTS SUFFICIENT TO JUSTIFY THE DEDUCTION AND WITHHOLDING BY THE ALIEN PROPERTY CUSTODIAN OF THE SUM OF $55,909.83, OR ANY PART OF IT; AND FOR THAT REASON THE DECREE APPEALED FROM SHOULD BE AFFIRMED

Under this point the brief states:

> * * * In the brief for appellants, it is argued that this sum of $55,909.83 "is no more than a fair and reasonable charge for administering appellees' seized property" (see Brief, p. 31). This is a mere assertion of counsel unsupported by anything in the record and one which in point of fact we

challenge. So far as this answer discloses, the Custodian simply needed money and found it convenient to take this sum from the money which the court had directed him to pay over to the appellees. * * *

Point II of their brief was headed as follows:

THE "EXPENSE OF ADMINISTERING THE MONEY OR PROPERTY," WHICH THE ALIEN PROPERTY CUSTODIAN IS ALLOWED TO DEDUCT, IS AN EXPENSE DIRECTLY CONNECTED WITH THE HANDLING OF THE PARTICULAR FUND, AS DISTINGUISHED FROM ANY PART OF THE GENERAL EXPENSE OF MAINTAINING THE CUSTODIAN'S OFFICE

Point III of their brief was headed as follows:

A STATUTE CHARGING AGAINST SUCCESSFUL CLAIMANTS OF PROPERTY SEIZED BY THE ALIEN PROPERTY CUSTODIAN ANY SUMS FOR ADMINISTRATIVE EXPENSE OTHER THAN SUCH ITEMS AS ARE NECESSARILY AND DIRECTLY ATTRIBUTABLE TO SUCH PROPERTY WOULD BE UNCONSTITUTIONAL

For the reasons stated in the brief in opposition filed by us, we contend that all of the arguments of the petitioners are without merit and that their petition should be denied.

Respectfully submitted.

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BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 90) is reported in 33 F. (2d) 556. The Supreme Court of the District of Columbia decided in favor of the petitioners without opinion. (R. 84.)

JURISDICTION

The decree sought to be reviewed was entered by the Court of Appeals of the District of Columbia on June 3, 1929. (R. 96.) The petition for writ of certiorari was filed August 31, 1929, and was granted on October 21, 1929. (280 U. S. 24A.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION INVOLVED

Under a statute (c. 285, 42 Stat. 1511, 1516) specifically providing that "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any * * * money or other property, or in protecting or administering the same * * * out of the money or other property * * * in respect of which such expenses are incurred, or * * * out of any other money or property held for the same person," was the Alien Property Custodian authorized to deduct from the proceeds of property seized as enemy property, but later held to belong to neutrals, $55,909.83 as expenses for collecting such property and administering the same for about ten years, the amount deducted being two per cent of the amount of the property returned to the owners?

STATUTES INVOLVED

All pertinent statutes and executive orders are quotted in the Appendix, pp. 40–48, *infra*.

STATEMENT

This suit was filed in the Supreme Court of the District of Columbia on December 8, 1921 (R. 1), by Jak. Robert Sigg-Fehr, Gottfried Rudolph Baumann-Kienast, and Edmund Gams under Section 9 of the Trading with the Enemy Act, as amended on June 5, 1920 (c. 241, 41 Stat. 977), by which they sought to recover from the Treasurer of the United States and the Alien Property Custodian the proceeds of the sale of 12,825 shares of the capital stock, together with accrued dividends and earnings upon the proceeds, of the Locomotive Superheater Company, a Delaware corporation, which were seized by the Alien Property Custodian in 1918, during the war between the United States and Germany, under the provisions of the Trading with the Enemy Act, as the property of the Schmidt'sche Heissdampf Gesellschaft, a German corporation (hereinafter referred to as the "German corporation") (R. 26–27, 40–46).

The Alien Property Custodian, after investigation, determined that the German corporation was an enemy not holding a license granted by the President and that it was the owner of 12,825 shares of stock of the Locomotive Superheater Company, a Delaware corporation, and seized the stock as enemy-owned. (R. 43.) The German corpo-

ration concededly was an enemy of the United States within the meaning of the Trading with the Enemy Act, and it is submitted that from the record in this case the Alien Property Custodian had substantial reasons to believe that said German corporation was the owner of said stock. (R. 29–64.) It was only after extended litigation in the preliminary phases of the instant case that the non-enemy ownership of the shares of stock in the petitioners was established. It is not questioned that in seizing and liquidating the property of these petitioners and in the defense of their suit the Alien Property Custodian was acting in good faith.

Jak. Robert Sigg-Fehr died after the suit was instituted, and Henry Escher, as ancillary administrator of his estate, was substituted as plaintiff in his stead. (R. 30.) A motion to dismiss and answer were filed on behalf of the Alien Property Custodian and the Treasurer of the United States on July 10, 1924. (R. 22.) On March 3, 1926, this suit was referred to a Special Master to hear the case and report to the court his findings of fact and conclusions of law together with the evidence. The Special Master filed his report on May 20, 1927 (R. 29), in which he found that the three plaintiffs, Sigg-Fehr, Baumann-Kienast, and Gams, on November 8, 1916, and continuously thereafter up to the time of the filing of the bill of complaint herein were all citizens of the City of Zurich, and that the

plaintiffs were neither enemies nor allies of enemies within the meaning of the Trading with the Enemy Act (R. 30); that on November 8, 1916, Sigg-Fehr, Baumann-Kienast, and Gams, trading as a copartnership, entered into a contract with the German corporation by which they acquired title to said 12,825 shares of the capital stock of the Locomotive Superheater Company (R. 33); that the Alien Property Custodian seized the stock and thereafter sold it to the Director General of Railroads of the United States for $2,656,000; that the present petitioners were entitled to recover the principal; and that they were also entitled to recover the accumulated earnings thereon under the authority of the decision of this Court in the case of *Henkels* v. *Sutherland,* 271 U. S. 298. (R. 63.)

On December 10, 1927, the trial court rendered a memorandum opinion confirming the findings of the Special Master (R. 64), in which it said that, "The Alien Property Custodian, by his seizure, acquired no greater rights than those of the German corporation, and as the Master has found as a fact that the German corporation, under the law of Switzerland, retained no interest, legal or equitable, in the stock, there was no interest that could be seized by the Custodian."

Thereafter, on January 19, 1928, a final decree was entered in the case (R. 65), directing the Alien Property Custodian and the Treasurer of the United States to pay to the plaintiffs "the said

money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the Trading with the Enemy Act and amendments thereto; and also deducting therefrom the said sum of $10,000.00 to be paid to the Special Master in accordance with this decree." (R. 66.)

No objection to this decree was made by either party.

On February 23, 1928, the attorney for the petitioners executed an acknowledgment of the satisfaction of this decree, except as to certain items, among which was included the following (R. 68):

> (1) The sum of $55,909.83 deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for the plaintiffs herein as an alleged administrative expense.

On March 23, 1928, the present petitioners filed in the Supreme Court of the District of Columbia a petition for rule to show cause why the sum of $55,909.83, deducted from the cash held by the Alien Property Custodian and/or the Treasurer of the United States for them as administrative expenses, as well as certain other items consisting principally of taxes paid to the United

States, should not be forthwith paid over by the Alien Property Custodian and/or the Treasurer of the United States to the petitioners (R. 69), and the rule to show cause was issued on March 23, 1928. (R. 79.) Thereafter, on March 29, 1928, the Alien Property Custodian and the Treasurer of the United States filed a "Motion to Discharge Rule to Show Cause and Answer to Petition" (R. 80–82), in which they admitted "that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid," and prayed that the rule to show cause be dismissed for the reason that the defendants had fully complied with the decree entered on January 19, 1928.

The plaintiffs then moved to strike the answer from the record on the ground that it was insufficient to justify the admitted refusal to pay the plaintiffs the sum in question and certain other sums not here involved, and asked the court to enter an order directing the defendants to pay over to the plaintiffs, among other things, said sum of $55,909.83. (R. 82.)

Thereafter, on April 2, 1928, the Supreme Court of the District of Columbia, after argument,

entered a decree by which it "adjudged, ordered, and decreed that the deduction of and retention by the defendants of the sum of $55,909.83 as administration expense from the property and moneys due the plaintiffs under the terms and provisions of the decree entered herein on January 19, 1928, is unlawful and without right * * *." (R. 84.)

The claim for the other items set forth in the petition for rule to show cause was duly answered in the "Motion to Discharge Rule to Show Cause and Answer to Petition," but the question of the right of the petitioners to the return of such items was not passed upon by the court in the decree entered on April 2, 1928 (R. 84), and, therefore, was not in issue before the Court of Appeals, and, consequently, is not here in issue.

The Court of Appeals rendered a unanimous opinion on June 3, 1929 (R. 90), reversing the decree of the trial court, and remanded the cause for further proceedings not inconsistent with its opinion. (R. 95.)

SUMMARY OF ARGUMENT

I. The Trading with the Enemy Act authorized the President to appoint an Alien Property Custodian and vested in the President power to seize enemy property. The President delegated his powers of seizure and administration to the Alien Property Custodian. The Act of March 4, 1923, specifically provided that the Custodian might pay the necessary expenses incurred by him in securing the

possession, collection, or control of money or other property seized by him or in protecting or administering the same, out of funds seized by the Custodian. This Court has held that the Custodian was authorized to seize property supposed to belong to an enemy even before an adjudication that it was enemy property, and has recognized that all property seized by the Custodian should be administered by him.

The Act of March 28, 1918, vests the Custodian with all the powers of a common-law trustee in respect of all property seized by him. We submit that Congress intended that the entire cost of administering the office of the Custodian should be borne by the trust funds administered by him. The practice of deducting for administrative expenses a fixed percentage of the trust funds upon their return to the owners had been in force for several years before the passage of the Act of March 4, 1923, and that Act operated as a confirmation of the existing practice.

Moreover, it is universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. This Court has said that proper charges and expenses may be deducted even from property wrongfully seized.

II. The deduction of a flat rate charge of two per cent has been determined by the Custodian to be the lowest amount necessary to cover the expenses in-

curred by him in collecting, protecting, and administering the seized property.

The principal of the trust estate of the petitioners amounted to over $3,000,000, and the estate was administered by the Custodian for over ten years. The amount deducted is about two per cent of the principal returned, and is about five per cent of the total income. We submit that the deduction of the sum of $55,909.83 was in compliance with the terms of the decree of the court which ordered the return of the petitioners' seized property "after deducting therefrom any expenses or disbursements * * * duly made under the authority of the Trading with the Enemy Act and amendments thereto."

The petitioners admit that the Custodian could deduct exact amounts expended in the administration of their property, but contend that they should not be charged "one cent more than the actual expense of protecting or administering such property" or anything on account of the general expenses of the Custodian's office. If deductions can not be made for this purpose, it is obvious that the authority given to the Custodian to pay expenses from trust funds will be largely ineffective. It was unavoidable that the Custodian should make mistakes and seize the property of nonenemies.

The action of the Alien Property Custodian in determining this method and amount is presumed to be reasonable and proper. The presumption of regularity supports the official acts of public officials and in the absence of clear evidence to the

contrary it is presumed that they have properly discharged their official duties.

III. The deduction by the Custodian of a fixed percentage to cover administrative costs or expenses did not deprive the petitioners of their property without due process of law. The Trading with the Enemy Act was passed under Article I, Section 8, clause 11 of the Constitution empowering Congress to declare war and make rules concerning captures on land and water. The power vested in the President to make rules and regulations with respect to the administration of property seized by the Alien Property Custodian included the power to regulate the administrative expenses to be deducted from seized property.

Therefore, the method employed by the Executive Department of deducting a flat rate of two per cent from the petitioners' seized property was the exercise of the discretionary power vested in the President, which is not reviewable. The power conferred by the Act to take enemy-owned property included the authority to seize property believed to belong to an enemy. This Act, and its amendments and the Executive Orders of the President, authorized the Custodian to make the deductions in question, as stated above. The Fifth Amendment does not prevent the exercise of war powers, and the Executive must have wide discretion as to the means to be employed in order to carry out the war successfully.

Moreover, it is not open to the petitioners to raise any constitutional question, as none was raised in the record in the courts below.

ARGUMENT

I

THE ALIEN PROPERTY CUSTODIAN WAS AUTHORIZED BY STATUTE AND EXECUTIVE ORDERS TO DEDUCT FROM THE PROPERTY RETURNED TO THE PETITIONERS A FLAT CHARGE TO COVER THE EXPENSES INCURRED IN COLLECTING, PROTECTING AND ADMINISTERING THEIR SEIZED PROPERTY IN HIS OFFICE

Section 6 of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 415 (p. 41, *infra*), authorized the President to appoint an officer to be known as the "alien property custodian," who should be empowered to receive all money and property in the United States belonging to an enemy, or ally of an enemy, and "to hold, administer, and account for the same under the general direction of the President." The power vested in the President by this section of the Act was delegated by him to the Alien Property Custodian by the Executive Order of October 29, 1917.

Section 7 (c) of the Trading with the Enemy Act, c. 106, 40 Stat. 411, 418 (pp. 41–42, *infra*, provided for the seizure of enemy property, the power being vested in the President. This power likewise was delegated by the President to the Alien Property Custodian by the Executive Order of October 12, 1917, pursuant to the provisions of Section 5 (a) of the Trading with the Enemy Act (p. 40, *infra*, which provided "That the President * * * may make such rules and regulations, not inconsistent

with law, as may be necessary and proper to carry out the provisions of this Act; and * * * may exercise any power or authority conferred by this Act through such officer or officers as he shall direct."

Section 24 of the Amendment to the Trading with the Enemy Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516 (pp. 45–46, *infra*), specifically provided that the Alien Property Custodian might pay the necessary expenses incurred by him, or by any depositary for him, in securing the possession, collection, or control of money or other property seized by him, or in protecting or administering the same, out of the funds seized by the Custodian.

By a provision contained in the Urgent Deficiency Act approved November 4, 1918, c. 201, 40 Stat. 1020 (pp. 41–42, *infra*), Section 7 (c) of the Trading with the Enemy Act was amended in certain particulars, and among other things, by the incorporation therein of a provision that the sole relief and remedy of any person having any claim to any money or other property seized by the Custodian should be that provided by the terms of the Trading with the Enemy Act, and, in the event of the sale of such property, the claim should be limited to and enforced against the net proceeds of the sale.

This Court has held that the Alien Property Custodian was authorized by the Trading with the Enemy Act to seize property *supposed to belong*

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to an enemy, even before an adjudication that it was enemy property (*Central Trust Co.* v. *Garvan,* 254 U. S. 554, 566, 567; *Stoehr* v. *Wallace,* 255 U. S. 239, 245), and "that there is implication in the act that mistakes may be made, but the act assumes 'that the transfer will take place whether right or wrong'," the owner of the property being amply protected by Section 9 of the Trading with the Enemy Act (pp. 42–44, *infra*). *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56, 57.

This Court has also recognized that under the amendment to the Trading with the Enemy Act of November 4, 1918 (c. 201, 40 Stat. 1020), all property seized by the Alien Property Custodian should be administered by him, and that by the Act of March 28, 1918 (c. 28, 40 Stat. 459), (pp. 44–45, *infra*), which provides that the Custodian shall be "vested with all of the powers of a common-law trustee in respect of all property" seized by him, he is given the power to "manage the same as though he were absolute owner thereof." *Central Trust Co.* v. *Garvan, supra.*

The Committee on Interstate and Foreign Commerce of the House of Representatives which drafted the bill which included Section 24, authorizing the deduction of administrative expenses, in its report, p. 6, of the bill to the House of Representatives (H. Rep. 1565, 67th Cong., 4th Sess.), in discussing the purpose of Section 24 of the Act of March 4, 1923, said:

> SECTION 24: The purpose is obviously to permit the Alien Property Custodian to pay all lawful taxes and the necessary expenses incurred by him in securing the possession of or in protecting or administering the property.

We submit that Congress, in passing Section 24, contemplated that the entire cost of administering the office of the Alien Property Custodian was to be borne by the trust funds administered by him. The practice of deducting administrative expenses from the several trust funds administered by the Alien Property Custodian had been in force for several years before the passage of the Act of March 4, 1923. (Report of Alien Property Custodian to the Senate of April 10, 1922, p. VI, Senate Document No. 181, 67th Cong., 2d Sess.; Hearings before the Joint Subcommittees of the Ways and Means Committee and the Interstate and Foreign Commerce Committee, House of Representatives, April 5–14, 1926, on H. R. 10820, pp. 88–93.)

The Act of May 16, 1928, c. 580, 45 Stat. 573, 574, specifically provides that all of the expenses of the *office* of the *Alien Property Custodian* should be paid out of the property held by him.

Even before the enactment of the Act of March 4, 1923, specifically authorizing the deduction from seized property of the expenses incurred by the Alien Property Custodian in securing the possession, collection, or control of and administering any money or other property seized by him as belonging

to an enemy, his right as a common-law trustee to make such deductions to cover the expenses incurred was authorized by the President by the Executive Orders of February 26, 1918 (No. 2813), and July 16, 1918 (No. 2916), and was recognized by the decision of the Comptroller of the Treasury of October 11, 1919 (26 Comp. Dec. 265).

The Executive Order of February 26, 1918, provided that—

> The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. * * * out of * * * the estate to which such money or other property belongs.

The Executive Order of July 16, 1918, specifically authorized and empowered the Alien Property Custodian "*To determine* and pay all reasonable and proper expenses" out of the property with respect to which such expenses accrued, or out of other property belonging to the same person.

The petitioners concede the right of the Alien Property Custodian to deduct administrative expenses from all seized property, whether rightfully or wrongfully seized. Congress by the Trading with the Enemy Act vested in the President the power to "make such rules and regulations, not inconsistent with law, as may be necessary and

proper to carry out the provisions of this Act." The Act did not prescribe the method to be employed in deducting administrative expenses.

Evidently Congress intended that the President should exercise his discretion with respect to the method to be employed, inasmuch as it vested very broad powers in the President with respect to the seizure, management, and control of property supposed to belong to an enemy. The President, by the Executive Order of July 16, 1918, delegated to the Alien Property Custodian the authority *to determine* and fix the amount of the administrative expenses to be deducted. Pursuant to this authority, the Custodian began the deduction of a flat rate upon property under Section 9, which method was in vogue before the enactment of the Amendment of March 4, 1923.

Moreover, the Alien Property Custodian, under the authority vested in him as a common-law trustee of all seized property, was authorized to deduct from the trust funds a reasonable charge for administering the trusts.

It has been universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. Perry in his treatise on Trusts and Trustees (7th ed.), Vol. 2, Sec. 910, p. 1535, says:

> Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that

there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. And for losses that may accrue to himself in the proper administration of the trust. Thus a trustee will be reimbursed all his necessary traveling expenses, and all reasonable fees paid for legal advice in the discharge of his duties. And this rule will be applied, although the trust may subsequently be declared void, if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate. * * *

Trustees v. *Greenough,* 105 U. S. 527.

Trustees generally in the United States are allowed reasonable expenses and in addition such compensation as the courts may order. In many of the States the compensation of trustees is fixed by statute at a certain percentage of the trust property. The allowance of compensation of 5 per cent is not uncommon, and in some instances a commission of 10 per cent has been upheld. Perry on Trusts and Trustees (7th ed.), Vol. 2, Sec. 918, p. 1543 *et seq.* In the case of *Barney* v. *Saunders,* 16 How. 535, at page 542, this Court said:

> In England, courts of equity adhere to the principle which has its origin in the Roman law, "that a trustee shall not profit by his trust," and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate.

In the case of *Magruder* v. *Drury,* 235 U. S. 106, this Court refused to disturb a decree of the Court of Appeals of the District of Columbia which allowed to trustees a commission of 5 per cent on the principal and 10 per cent on the income.

This Court has held that even where property was wrongfully seized *proper charges and expenses* may be deducted from such property. In *Henkels* v. *Sutherland, supra,* Max Henkels, an American citizen and resident of the United States, claimed certain property which had been mistakenly seized by the Custodian, and the corpus of the property was returned to him under a decree of court. Henkels contended that he was also entitled to recover the earnings which had accrued from the investment of his principal by the Secretary of the Treasury pursuant to the provisions of Section 12 of the Trading with the Enemy Act. This Court said (p. 302):

> Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and, thereupon, *after deducting proper charges and expenses* and taking into consideration the average amount of such proceeds which remained uninvested in the Treasury, a proportionate allocation made in respect of the proceeds belonging to Henkels for the period of their investment. * * * (Italics ours.)

The petitioners contend that the decision of the court below by implication conflicts with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Vowinckel* v. *Sutherland,* 24 F. (2d) 196. In that case the court determined that the plaintiff was a nonenemy under the Trading with the Enemy Act and that his property had been erroneously seized, and held that the Alien Property Custodian was not authorized to pay out of the plaintiff's seized property certain traveling expenses of an attorney of the Department of Justice, who went to San Francisco to argue the case, and the cost of printing a brief for the Department of Justice. But the court was careful to point out at page 198 that the—

> Expenses incurred * * * were not incurred by the Custodian, or by any depositary for him, in securing the possession, collection or control of the money or property,

and it seems equally manifest that they were not incurred in protecting or administering the same.

We submit that there is no conflict between the decision in the *Vowinckel case* and the decision of the court below in the present case.

The enactment by Congress of the Act of March 4, 1923, was a Congressional ratification, approval and adoption of the practice of the Alien Property Custodian previously established under his powers as a common-law trustee, of deducting a flat-rate charge on the seized property for administrative expenses.

The fact that the practice of assessing charges against all property returned under Section 9 of the Trading with the Enemy Act had been instituted long prior to the Act of March 4, 1923, *supra,* was well known. (Report of Alien Property Custodian to the Senate of April 10, 1922, p. VI, Senate Document No. 181, 67th Cong. 2d Sess.; Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives, December 21, 1922, on H. R. 13496, Sixty-seventh Congress, 4th Sess, pp. 23, 25–27; Hearings before the Joint Subcommittees of the Ways and Means Committee and the Interstate and Foreign Commerce Committee, House of Representatives, April 5–14, 1926, on H. R. 10820, pp. 88–93; Hearings before the Subcommittee of the Committee on Appropriations of the House of Rep-

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resentatives, 70th Cong. 1st Sess., Dec. 13, 1927, pp. 3–16.)

The enactment of the Acts of March 4, 1923, and of May 16, 1928, both of which directed that all expenses should be paid from the trust funds, were Congressional ratifications and confirmations of the prior construction of the authority conferred under the original Trading with the Enemy Act, and particularly in Section 12 which vested in the Alien Property Custodian the rights, powers, and functions of a common-law trustee.

The construction of the statute by the President, who is charged with the duty of enforcing it, and by his delegate, the Alien Property Custodian, should not be overruled unless such construction is clearly erroneous. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14; *United States* v. *Moore*, 95 U. S. 760; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Johnston*, 124 U. S. 236; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Bank of North Carolina*, 6 Pet. 29, 39; *Five Per Cent Cases*, 110 U. S. 471, 484.

As this Court said in *National Lead Co.* v. *United States*, 252 U. S. 140, 147:

> * * * Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256.

Cf. *Brewster* v. *Gage*, 280 U. S. 327, 337.

II

THE DEDUCTION OF A FLAT-RATE CHARGE OF TWO PER CENT OF THE PRINCIPAL OF THE PROPERTY RETURNED TO PETITONERS WAS PROPER

(a) *The Alien Property Custodian's practice of making a flat-rate charge of 2 per cent is a reasonable exercise of his discretionary powers and should not be upset*

As hereinbefore shown, the President was given very broad powers with respect to the seizure and administration of property supposed to belong to an enemy. The President under his war powers seized the petitioners' property and by the Executive Orders of February 26, and July 16, 1918, directed the Alien Property Custodian to deduct administrative expenses therefrom, and vested in the Custodian the power to determine and fix the amount of such expenses. The Custodian deducted from the property returned to these petitioners two per cent of the principal.

In order that each trust might contribute equably to the expense of administering the several trusts, a fixed percentage has been deducted by the Alien Property Custodian from each trust. The several trusts have contributed to the expenses in the same proportion and the amount deducted from the property returned to these petitioners was proportionately the same as has been deducted from the money and other property returned to other claimants. This procedure is in accordance with the principle

of a proportionate allocation of interest earned upon funds returned as outlined in the *Henkels case*. This deduction was of the lowest amount necessary to cover the costs of administering these trusts. The uniform charge of 2 per cent deducted by the Custodian has been found by him to be the amount necessarily required to collect, protect, and administer the property in the various trusts under his control. (Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, December 13, 1927, pp. 3–16.)

The principal of the trust estate of these petitioners amounted to about three million dollars. (R. 74.) The $55,909.83 deducted is less than 2 per cent of this amount. The administration of this principal involved arranging for and considering an appraisal of the stock seized, the consummation of the sale thereof, and investing the proceeds of the sale, collecting dividends from the stock and income from the bonds, and investing the dividends and income regularly, besides other general details incident to the collection, care, and administration of the property. (R. 74–75.)

The petitioners concede that the Alien Property Custodian might deduct such disbursements or expenditures necessarily made, "such in general as they themselves would have had to pay if in possession of the property." It is obvious that the administration of this property—extending over a

period of ten years—must have required a considerable amount of routine work, as well as the exercise of discretion and judgment. The percentage charged is much less than would ordinarily be allowed to a private trustee for similar services in administering a trust of this size for the long period of time this trust estate was administered by these respondents, and is much less than was paid to the petitioners' trustees for their services with respect to this property before it was seized. (R. 75.)

Inasmuch as the amount deducted was required to meet the total cost of collecting, protecting, and administering the petitioners' seized property, it is submitted that the action of the Alien Property Custodian in deducting the sum of $55,909.83 from the petitioners' seized property was authorized by the Act of March 4, 1923 (c. 285, 42 Stat. 1516), and is in full compliance with the terms of the decree of the Supreme Court of the District of Columbia entered in this case on January 19, 1928 (R. 65–66), which ordered the return of the petitioners' seized property, together with any and all income therefrom and additions and accretions thereto, "after deducting therefrom any expenses or disbursements * * * duly made under the authority of the Trading with the Enemy Act and amendments thereto."

The Alien Property Custodian, pursuant to the Trading with the Enemy Act, seized the property of thousands of persons, and as stated by this Court

in *Haycraft* v. *United States*, 22 Wall. 81, 94, it must have been anticipated that in the indiscriminate seizure of property pursuant to legislation enacted under the war powers of Congress, that "friends as well as foes might suffer." In the administration of these thousands of trusts it was deemed by the Executive Department to be practicable and economical to tax each trust with a uniform charge for administrative expenses which was made the lowest amount possible to cover the administration of the several trusts. It is obvious that if the Custodian had kept an exact account of the expenses incurred with respect to each trust it would have entailed a far greater overhead expense and resulted in a much greater aggregate charge for the administration of the seized property.

It is well known that at the time of the enactment of the Trading with the Enemy Act there was approximately a billion dollars worth of property supposed to belong to enemies located within the territory of the United States and its possessions, which property was seized by the Alien Property Custodian pursuant to the provisions of said Act. (Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives, December 21, 1922, on H. R. 13496, 67th Congress, 4th Sess., pp. 4–5.) The Custodian seized the property of over fifty thousand individuals, partnerships, corporations, companies, associations, or other unincorporated bodies.

The petitioners state in their brief that—

> They do not contest the deduction by the Custodian of all reasonable disbursements or expenditures necessarily made for the purpose of protecting their money and property and which are directly attributable to such money or property; * * *. [Brief of Petitioners, p. 8.]
>
> As stated at the outset of this brief, we concede the right of the Alien Property Custodian to charge against this property all disbursements or expenditures necessarily made for the purpose of protecting and taking care of their money and property; such in general as they themselves would have had to pay if in possession of the property. [Brief of Petitioners, p. 36.]
>
> They deny the right of the Custodian to pay any part of the general expenses or overhead of his office out of their property which was wrongfully or at least mistakenly seized by him, and in particular they contest his right to deduct on that account a percentage of their money and property arbitrarily fixed by him. They contend that as a matter of fact and of law the cost or expense of administering property is not and can not be measured by the amount of value of that property, and that even if deduction of some percentage be permissible, the Custodian can not fix arbitrarily upon what that percentage shall be. [Brief of Petitioners, pp. 8–9.]

In other words, they contend that the Alien Property Custodian can not uniformly tax all

seized property with a certain fixed charge for administrative expenses but must keep a cost accounting system and definitely determine the actual cost incurred with respect to each item of seized property and assess each parcel of property with the actual cost incurred with respect thereto.

To upset this practice which has been in vogue for many years would result in infinite mischief leading to great confusion and extensive litigation.

In *United States* v. *Bank of North Carolina*, 6 Pet. 29, 39, *supra*, this Court said:

> It is not unimportant, to state, that the construction, which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed, without introducing a train of serious mischiefs. We think, the practice was founded in the true exposition of the terms and intent of the act; but if it were susceptible of some doubt, so long an acquiescence in it, would justify us in yielding to it as a safe and reasonable exposition.

The petitioners contend that the bringing of this suit restricted the respondents from thereafter

deducting administrative expenses (Brief of Petitioners, pp. 26, 27), inasmuch as Section 9 of the Trading with the Enemy Act (c. 285, 42 Stat. 1511), provides that "If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States * * * until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied * * * or suit otherwise terminated."

Section 9, which includes the above-quoted provision, was reenacted in the Amendment of March 4, 1923, which amendment included Section 24, which provides that the Alien Property Custodian may pay all taxes assessed against seized property held by him or the Treasurer of the United States as well as "the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same."

Under the theory of the petitioners the mere filing of a suit would automatically stop the Alien Property Custodian from paying taxes which had lawfully accrued upon seized property or deducting necessary administrative expenses incurred in administering such property. Such a construction of the Act would in effect defeat the purpose of Section 24. Sections 9 and 24 being a part of the Act of March 4, 1923, it follows that they must be con-

strued together. The restrictions of Section 9 undoubtedly prohibit the Alien Property Custodian from selling the property claimed in a suit or converting it into property of a different character, but it certainly can not be construed to prohibit the payment of taxes and the deduction of necessary administrative expenses.

It is a general rule that in the construction of a statute the intention of the lawmakers is to be deducted from the whole statute and every material part thereof. *Kohlsaat* v. *Murphy,* 96 U. S. 153; *Pennington* v. *Coxe,* 2 Cranch, 34; *Neal* v. *Clark,* 95 U. S. 704; *Peck* v. *Jenness,* 7 How. 612, 622.

(*b*) *The action of the Alien Property Custodian in making a charge of two per cent, from the property returned, must be presumed to be proper and reasonable under the presumption of regularity which supports the official acts of public officers.*

The petitioners assert that the Custodian unlawfully and wrongfully deducted as administrative expenses the amount here claimed. The Custodian admitted the deduction and stated that he had paid the money in question into a fund maintained by him to cover payments for expenses incurred in administering money and other property seized under the Trading with the Enemy Act. No evidence was introduced on this point by either party.

It must be presumed that the action of the President, by his Executive Orders in instructing the Alien Property Custodian to deduct administrative

expenses from seized property and to determine the amount thereof and the action of the Custodian pursuant to such orders in charging a flat rate of 2 per cent upon all property returned to claimants were regular and in accordance with appropriate authority. This Court in *United States* v. *Chemical Foundation,* 272 U. S. 1, at page 14, said:

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. * * *

The duty imposed upon the Custodian actually was to conduct a tremendous business without profit, which at the same time should support itself except for minor items. This enterprise did not develop in an orderly manner over a period of time, but sprang into existence in the midst of the chaotic conditions induced by war.

In the performance of his duty the Custodian within a few months seized hundreds of parcels of property, the capital stock of many corporations, and stupendous sums of money. After seizures were made numerous claims for property erroneously taken were filed and allowed, with the result that return of estates to successful claimants began almost simultaneously with the establishment of the office.

Expenses incurred in securing the possession, collection, or control of any money or other property and in protecting or administering the same,

accrued and had to be paid. There was no time for expert accountants to develop a complicated system of accounting, nor was there any way of knowing how long the war would last and the Custodian be compelled to hold property. All that was known was the value of the properties seized. Therefore, the only feasible method of providing funds for the payment of expenses was to figure a reasonable charge against the estate based upon the only known quantity, the value. It developed that the system evolved at the beginning was a just and satisfactory one, and it has been followed to the present date.

Petitioners contend that a system of accounting of superlative refinement should have been adopted. Such a system would have necessitated greatly increased personnel and other expense, and would have imposed an additional and oppressive burden upon the properties held, which the Custodian was not justified in inaugurating.

No charges of fraud or misfeasance have been made against the Custodian in his administration of the estate. Therefore he must be assumed to have acted properly. When a public officer acts with ordinary caution and good faith, his action should not be disturbed.

It is obvious that the deduction for the cost of administering an estate of approximately $3,000,000 for ten years could not well be less than $55,909.83.

III

THE DEDUCTION BY THE ALIEN PROPERTY CUSTODIAN OF A FIXED PERCENTAGE FROM SEIZED PROPERTY TO COVER ADMINISTRATIVE EXPENSES DID NOT CONSTITUTE A TAKING OF THE PETITIONERS' PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

This Court in *Stoehr* v. *Wallace, supra,* at pages 241–242, 245, held that the Trading with the Enemy Act as originally enacted, as well as the Amendment of March 28, 1918, vesting in the Alien Property Custodian all of the powers of a common-law trustee, was constitutional. The Court said:

> The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411, or as since amended, March 28, 1918, c. 28, 40 Stat. 459, 460; November 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977, is strictly a war measure and finds its sanction in the constitutional provisions, Art. I, sec. 8, cl. 11, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown* v. *United States,* 8 Cranch. 110, 126; *Miller* v. *United States,* 11 Wall. 268, 305.
>
> It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody and disposal of enemy property. By section 5 he is in terms authorized to exercise "any" of these powers "through such officer

> or officers as he shall direct." By section 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. * * *
>
> * * * * *
>
> That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy owned, if adequate provision be made for a return in case of mistake, is not debatable. * * *

In view of the extensive powers vested in the President respecting the sequestration, custody and disposal of property believed to be enemy-owned and of the power vested in him by Section 6 of the Trading with the Enemy Act to "appoint" and "prescribe the duties of" the Alien Property Custodian, and of the power vested in him by Section 5 to "make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act," and of his power to exercise his authority "through such officer or officers as he shall direct," he unquestionably had the right to fix and determine the amount of the administrative expenses to be deducted from seized property or to delegate such power to the Alien Property Custodian, in the absence of any provision in the statute fixing the amount of administrative expenses to be deducted. The statute unquestionably vested the Executive with the power

to deduct administrative expenses. The method to be employed in making such deductions was discretionary. The President delegated the power to the Custodian by the Executive Order of February 26, 1918, to deduct administrative expenses, and by the Executive Order of July 16, 1918, he delegated to the Custodian his power and authority to determine and fix the amount of administrative expenses. Pursuant to such authority, the Custodian adopted the method of deducting a flat rate percentage from seized property returned under Section 9.

In the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, this Court upheld the private sale by the Alien Property Custodian of some 4,900 patents, which was made under the authority of an Executive Order issued by Frank L. Polk, delegate of the President. The property under such sale concededly was sold for a grossly inadequate price. The discretionary power vested in the Executive by Section 12 to authorize private sales of property seized by the Alien Property Custodian is analogous to the authority vested in the President by Section 5(a) of the Act to make "such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act."

Since this Court has declined to interfere with the discretionary act of the President with respect to authorizing private sales of enemy property,

which were concededly made for a grossly inadequate price, there would seem to be no constitutional reason for questioning the discretionary power of the Executive Department in deducting a flat charge from seized property.

The words "without due process of law" have long been held to be "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 245.

It may be that in this case the property of petitioners has been required to bear more or less of the burden of administering all the estates held than some others, but unless it be demonstrated that the deduction from this property made to cover administrative expense resulted in a substantial deprivation to petitioners, and an absence of distributive justice, these petitioners can not contend that their property has been taken without due process of law. There are no facts in the record nor allegations in the pleadings in this case which justify the assertion of petitioners.

In *Highland* v. *Russell Car Co.*, 279 U. S. 253, a section of another war-time measure, the Lever Act, was construed. The sole question was whether the constitutional rights of an American citizen were infringed by the enforcement of the Act and orders which prevented him from selling his coal for more

than the prices he was entitled to receive under the Act. The provisions of the statute were held not to be so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment. The Court said, at pp. 261, 262:

> Under the Constitution and subject to the safeguards there set for the protection of life, liberty and property * * * the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on.

Furthermore the Constitution permits a certain latitude in times of a national emergency. In *Highland* v. *Russell Car Co., supra,* in discussing freedom to contract, the Court said (p. 261):

> It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the Fifth and Fourteenth Amendments. (Citing cases.) *It is also well-established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts when-*

> *ever reasonably necessary to effect any of the great purposes for which the national government was created.* (Italics ours.)

An Act adopted and held valid under the war powers conferred by the Constitution must be flexible to the extent that a governmental agency may be permitted to determine just and proper expense necessary in administering property held thereunder on the only basis practicable. Nor is it permissible to construe Section 24 apart from the body of the Act. It is too well settled to require citation of authorities that a statute must be construed as a harmonious whole, and that one portion must not be construed so as to annul and destroy another.

Moreover, we submit that it is not open to the petitioners to raise any constitutional question, as it is well settled that this Court will not review a constitutional question unless the question was either ruled upon by the trial court or a ruling requested and declined. *Cornell* v. *Green,* 163 U. S. 75, 78; *Richards* v. *Michigan Central Railroad Company,* 186 U. S. 479.

The record must show that the constitutional question was raised for the consideration of the District Court. *Paraiso* v. *United States,* 207 U. S. 368, 370; *Arkansas* v. *Schlierholz,* 179 U. S. 598.

The record in this case does not show that a constitutional question was raised in the courts below. (R. 69–73.)

CONCLUSION

The decree of the Court of Appeals of the District of Columbia entered herein on June 3, 1929, should, therefore, be affirmed.

Respectfully submitted.

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April, 1930.

APPENDIX

STATUTES

Trading with the Enemy Act:

SECTION 5 (a). (c. 106, 40 Stat. 411, 415.) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and *he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.* (Italics ours.)

SECTION 6. (c. 106, 40 Stat. 415.) That the President is authorized to appoint * * * an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said Custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. * * * The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act.

SECTION 7 (c). (c. 201, 40 Stat. 1020.) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States. (Act of October 6, 1917, as amended November 4, 1918.)

Section 9 (a). (c. 285, 42 Stat. 1511.) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest

therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the

United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. (Act of October 6, 1917, as amended March 4, 1923.)

SECTION 12. (c. 28, 30 Stat. 460.) The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchas-

ing property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the Alien Property Custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

SECTION 24. (c. 285, 42 Stat. 1516.) The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in

respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act. (Act of March 4, 1923.)

EXECUTIVE ORDERS

February 26, 1918 (No. 2813):

(a) The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the "Trading with the Enemy Act" and the Executive orders, rules, and regulations heretofore, hereby, or hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee, or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees, and attorneys in fact and fix the penalty and conditions thereof.

(b) *The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about collecting dividends, interest, and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.*

(c) The Alien Property Custodian may authorize depositaries designated by him and

agents, bailees, and attorneys in fact appointed by him to deduct all expenses authorized or approved by the Alien Property Custodian, including the compensation of such depositaries, agents, bailees, and attorneys in fact, from any moneys collected by them and the payment by them to the Alien Property Custodian or into the Treasury of the United States of the net amount remaining in their hands. (Italics ours.)

July 16, 1918 (No. 2916):

To determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depositary for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic * * *.

This Executive Order further provided that—

All costs and expenses incurred by reason of or in respect of, and all claims and demands of every kind, character, and description based upon or arising out of, the custody, management, administration, protection, preservation, and control of any such property and the conduct or other operation of any such going business or other undertaking and the sale or other disposition of any such property, shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which, on account of which, or in respect of which such cost, expenses, claim, or demand shall have been incurred and shall have

arisen or been created; provided that whenever such property or the income therefrom or the assets of any such going business or other undertaking shall be insufficient therefor, such cost, expenses, claim, or demand shall be charged thereto, but may be paid or satisfied out of money or other property received from, or as the property of, the same enemy.

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1929.

Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast, and Edmund Gams, Petitioners,

vs.

Walter O. Woods, Treasurer of the United States, and Howard Sutherland, Alien Property Custodian.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[April 28, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by citizens of Switzerland to recover property mistakenly seized during the late war as belonging to an alien enemy. The plaintiffs recovered, but on a statement of account by the Alien Property Custodian he claimed a deduction of $55,909.83 for administrative expenses, "said sum having been paid by [him] into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." On a rule to show cause the claim was disallowed by the Supreme Court of the District of Columbia, but the decision was reversed by the Court of Appeals. 33 F. (2d) 556. A writ of certiorari was granted by this Court.

In the answer to the motion to show cause why the charge should not be stricken out it was not alleged and no evidence was offered to show that the expenses actually incurred in respect of the particular fund were equal to this sum, or what, if any, they were. It was said to be impracticable to prove them or to apportion the general expenses of the office. The amount was two per cent. of the assets handed over and it is said that without pleading or evidence the record shows this to be a reasonable charge.

To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, § 12; 40 Stat. 411,

423, amended by Act of March 28, 1918, c. 28; 40 Stat. 459, 460, by which the Alien Property Custodian is "vested with all the powers of a common-law trustee" in respect of all property, "other than money", received by him under the Act and may exercise any powers appurtenant thereto "as though he were the absolute owner thereof." They also invoke Executive Order, February 26, 1918 (No. 2813) that the Custodian "may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property . . . and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs." Also Order of July 16, 1918 (No. 2916), of which it is necessary to mention only the direction that the expenses "shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which" the expenses shall have arisen provided that if the property or assets of the business are insufficient, they may be satisfied out of other property "received from, or as the property of, the same enemy." Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding § 24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other property of the same person, 42 Stat. 1511, 1516; and May 16, 1928, c. 580; 45 Stat. 573, 574, that "all expenses of the office . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary the directions are explicit that the expenses charged to a given property are those incurred

in getting or protecting it, or at least others similarly due from the same owner. But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean*, 117 U. S. 567, 582.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.